TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1915

No. [redacted] 214

[redacted] SMITH AND GERTRUDE W. SMITH, PLAINTIFFS IN ERROR,

vs.

[redacted] NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, AND F. P. ZOLLINGER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.

FILED AUGUST 5, 1915.

(24,273)

(24,872)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 589.

D. B. SMITH AND GERTRUDE W. SMITH, PLAINTIFFS IN ERROR,

vs.

THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, AND F. P. ZOLLINGER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW MEXICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 24, 1916.

1 Be it remembered, that heretofore, on to-wit *on* the third day of September, A. D., 1914, there was filed in the office of the clerk of the supreme Court of the state of New Mexico, a transcript of record in a certain cause entitled "The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, Appellees, versus D. B. Smith, et ux., Appellants," Numbered 1737, a true copy of the portions of which said transcript of record called for by the written præcipe are as follows, to-wit:

2 In the Supreme Court of the State of New Mexico, January Term, A. D. 1914.

No. —.

THE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and F. P. ZOLLINGER, Appellees,

vs.

D. B. SMITH and GERTRUDE W. SMITH, His Wife, Appellants.

Appeal from District Court, Dona Ana County.

TRANSCRIPT OF RECORD.

Be it remembered, That heretofore, on, to-wit, the 17th day of August, A. D. 1912, there was filed in the office of the clerk of the District Court of the Third Judicial District of the State of New Mexico, within and for the County of Dona Ana, a mandate of the

3 Supreme Court of New Mexico, in a certain cause, lately pending in said county of Dona Ana, wherein The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger were plaintiffs, and D. B. Smith and Gertrude W. Smith, his wife, were defendants, and which said mandate is in words and figures following, to-wit:

The State of New Mexico to the District Court Sitting within and for the County of Dona Ana, in the Third Judicial District, Greeting:

Whereas, In a certain cause lately pending before you, wherein The Third National Bank of Sandusky, Ohio, and F. P. Zollinger were plaintiffs and D. B. Smith and Gertrude W. Smith, his wife, were defendants, by your consideration in that behalf, judgment was entered against the said defendants; and

Whereas, The said cause and judgment were afterwards brought into our Supreme Court for review by appeal, whereupon such proceedings were had in said Supreme Court that at the January, 1912, term thereof, on the twenty-ninth day of said term, the same being Monday, May 6th, A. D. 1912, it was considered that the judgment

aforesaid, by you in form given, be reversed and that the said cause be remanded to you with directions to proceed with the case in accordance with the opinion of this court.

Now, Therefore, You are hereby commanded to reinstate said cause upon your docket and proceed in accordance with the opinion of this court herein.

4 Witness the Honorable Clarence J. Roberts, chief justice of the Supreme Court of the State of New Mexico, and the seal of said court, this 15th day of August, A. D. 1912.

[SEAL.] JOSE D. SENA, *Clerk.*

And be it remembered, That theretofore, and on, to-wit, the 13th day of September, A. D. 1910, there was filed in the office of the clerk of said Third Judicial District Court of the Territory (now State) of New Mexico, in and for Dona Ana County, in said cause, a complaint, which said complaint is in words and figures following, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico Within and for the County of Dona Ana.

No. 3059.

THE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and F. P. ZOLLINGER, Plaintiffs,

vs.

D. B. SMITH and GERTRUDE W. SMITH, His Wife, Defendants.

Complaint.

The plaintiffs complain and allege:

I.

That on May 11th, 1909, said defendant D. B. Smith, at El Paso, in El Paso county, in the state of Texas, made and delivered to and payable to the order of W. H. Reinhart, his, said Smith's, three cer-

5 tain promissory notes, each for the principal sum of forty-five hundred dollars, payable, respectively, one, two and three years after date, with interest at the rate of 8 per centum per annum from date, and payable annually, and providing in each of said notes that the holder or holders thereof should have the right and option, in case the maker should default in the payment of any annual instalment of interest, or in payment of either of said notes at maturity, to declare each and all of said notes due and payable, and further providing for payment of 10 per centum upon the amount of principal and interest due thereon, as attorney's fees, if placed in an attorney's hands for collection. Plaintiffs attach hereto, and as a part hereof, as Exhibits "A," "B" and "C," true copies of each of said three notes, and of the indorsements thereon. That for

the purpose of securing the payment of said three notes, the said D. B. Smith, joined by his wife, Gertrude W. Smith, by an instrument in writing of date May 11th, 1909, duly acknowledged and delivered on June 7th, 1909, conveyed in trust to the plaintiff F. P. Zollinger, trustee, certain lands and real estate situate in the county of Dona Ana, territory of New Mexico, and in which said instrument, same being a deed of trust, and duly recorded in Book No. 11, on pages 33 et sequitur, Mortgage Records of said Dona Ana county, said lands and real estate and certain ditch and water rights are described as follows:

First. A tract of land containing three hundred and sixty-three and one-tenth (363.1) acres, and being all of a tract of four hundred and fifty-nine and nine-tenths (459.9) acres, embraced within the following field notes:

6 Beginning at an alamo post for the east corner, standing at the side of an alamo tree, running thence S. 45° W. 2,400 feet to a stake for a corner; thence S. 58° W. 1,330 feet to a stake; thence S. 11° W. 3,130 feet to a post standing on the north bank of the old Rio Grande; thence up the old Rio Grande with its meanders N. 59° W. 990 feet; thence S. 14° E. 830 feet; thence S. 86° W. 280 feet; thence N. 60° W. 600 feet; thence N. 22° W. 580 feet; thence N. 30° 600 feet; thence N. 28° E. 800 feet; thence N. 22° E. 500 feet; thence N. 30° E. 900 feet; thence N. 10° W. 600 feet; thence N. 30° W. 500 feet; thence N. 67° W. 1,110 feet; thence S. 30° E. 460 feet; thence S. 62° W. 220 feet; thence N. 70° W. 250 feet; thence N. 17° W. 440 feet; thence N. 30° 530 feet; thence N. 59° E. 860 feet; thence N. 26° E. 640 feet; thence S. 83° E. 610 feet; thence S. 50° E. 250 feet; thence S. 600 feet to a stake standing on the south bank of the said Rio Grande; thence across the bend of the old Rio Grande N. 42° E. 2,300 feet to a stake for the northwest corner situated in a dense alamo thicket from which an alamo tree marked — bears S. 12° E. 29 feet, another alamo tree marked — bears N. 75° W. 74 feet; and another tree with the same marks bears N. 7½° W. 7 feet; thence S. 80° E. 3,600 feet to the place of beginning. Except a certain tract of land of ninety-six and eight-tenths (96.8) acres, including within the foregoing field notes of said four hundred and fifty nine and nine-tenths (459.9) acres, which said tract of ninety-six and eight-tenths (96.8) acres is not hereby conveyed or intended to be conveyed, but is especially reserved and excepted from the lands

7 hereby conveyed, and the description herein given of said ninety-six and eight-tenths (96.8) acres is given for the express purpose of identifying said tract of ninety-six and eight-tenths (96.8) acres and segregating the same from the lands hereby conveyed, and said ninety-six and eight-tenths (96.8) acres is here now described as follows:

Beginning at a post standing on the north bank of an old abandoned channel of the Rio Grande (same being the S. E. corner of the above described four hundred and fifty-nine and nine-tenths [459.9] acre tract); thence N. 11° E. 630 varas to the point where it is claimed the northern boundary of grant of land known as the

Santa Teresa Grant crosses the eastern boundary of the afore described four hundred and fifty-nine and nine-tenths (459.9) acres tract; thence along and on what is now asserted by claimants of said Santa Teresa Grant to be the northern boundary line of said Santa Teresa Grant, westward to where said asserted or pretended north line of the Santa Teresa Grant intersects said old channel of the Rio Grande, and thence down the centre of said channel of the Rio Grande with its meanders, to the place of beginning, said ninety-six and eight-tenths (96.8) acres being a part of and taken off of the southern end of said four hundred and fifty-nine and nine-tenths (459.9) acres tract described.

Second. All that tract of land containing an area of one hundred and three and three-tenths (103.3) acres, which was acquired by Louis F. Acosta from the commissioners of the Refugio Land Grant on the 4th day of December, 1894, by deed of that date, wherein said tract is described as follows:

8 From east to west on its south side it measures one thousand (1,000) yards, and is bounded by lands of Canuto Alvarez; from south to north on its west side it measures five hundred (500) yards, and is bounded by the line of the Refugio Grant; from west to east on its north side it measures one thousand (1,000) yards and is bounded by vacant land; and from north to south on the east side it measures five hundred (500) yards, and is bounded by public road and vacant lands.

Third. All that certain tract and parcel of land which was conveyed to Guadalupe Carrasco by the commissioners of the Refugio Land Grant, by deed dated November 24th, 1888, and therein described as follows: From east to west on the north side it measures three hundred (300) yards, and is bounded by lands of Morris Freudenthal; from north to south on its west side it measures one hundred and fifty (150) yards and is bounded by lines of the Refugio Colony Grant; from west to east on the south side it measures three hundred and fifty (350) yards, and is bounded by lands of Tranquillo Fierro; and from south to north on its east side it measures three hundred (300) yards, and is bounded by lands of Lorenzo Carrasco.

"And I do hereby further convey, set over, assign and transfer to said trustee, in trust, all and every ditch and water rights in any wise pertaining to the lands aforesaid and by me acquired, had and held under the terms and provisions of the said deed from Reinhart to me, as well as all and every other ditch, water and irrigation right or concession as may by me be hereafter acquired in connec-

9 tion with my use, possession and occupation of said lands as as appurtenant thereto, during the life or subsistence of this deed of trust and the lien hereby created." A true copy of which said deed of trust, with the indorsements thereon, is hereto attached as a part hereof and is marked Exhibit "D." That said deed of trust contains a condition of defeasance to the effect that the same should be null and void in the event the said defendant D. B. Smith should well and truly pay the sums of money in said three notes respectively specified, fully, in accordance with the reading and

tenor thereof, with interest, attorney's fees and such other costs or charges as might accrue thereon.

II.

That on or about the 15th of June, 1909, said W. H. Reinhart, the payee named in each of said notes, and before the maturity of either of said notes, as well as before the maturity of any annual instalment of interest accruing thereon for value, sold, assigned, indorsed and set over each and all of said three notes to plaintiff The Third National Exchange Bank, a corporation duly organized under the laws and acts of Congress of the United States governing the organization of national banks, and as such doing business in the city of Sandusky, county of Erie and state of Ohio, and said three notes became and have since been and are now owned and held by said plaintiff The Third National Exchange Bank.

10

III.

That in the said deed of trust, executed by defendants, D. B. Smith and his wife, Gertrude W. Smith, it was provided that in the event of foreclosure there should be paid, out of the proceeds of sale, a commission of 5 per centum to the trustee to cover costs, expenses and for trustee's services in the premises. That the plaintiff F. P. Zollinger is such trustee and has rendered service and incurred and will incur costs and expenses herein.

IV.

That on May 11th, 1910, there became due an annual instalment of interest on all of said notes and amounting to one thousand and eighty dollars, and that one of said notes payable one year after date became due for the principal sum, represented thereby, to-wit, forty-five hundred dollars, and that although payment of said accrued interest, as well as said principal sum due on said one of said notes was on said May 11th, 1910, and has often since been demanded, the said D. B. Smith has failed and refused and still fails and refuses to pay the same, or any part thereof, and no part of the same has been paid.

V.

The plaintiff The Third National Exchange Bank, being the owner and holder of all of said three notes, on account of the defaults of defendant D. B. Smith, as stated in the preceding paragraph, has exercised and now does exercise its right and option to declare all three of said notes and all sums of money, principal, interest and attorney's fees to be due and owing, and that there is now due upon said three notes principal sums amounting, in the
11 aggregate, to thirteen thousand five hundred dollars, together with the further sum of one thousand and eighty dollars interest accrued May 11th, 1910, with interest on both of said amounts from May 11th, 1910, and no part of which has been paid.

VI.

Plaintiffs say that the defendants are both non-residents of the territory of New Mexico and reside in the city of El Paso, in El Paso county, state of Texas, their last known postoffice address in said city being No. 908 Magoffin avenue.

VII.

Wherefore, premises considered, plaintiff prays:

First. For citation to defendants as the law directs.

Second. For judgment in favor of The Third National Exchange Bank, upon said three promissory notes against the defendant D. B. Smith, in the sum of fourteen thousand, five hundred and eighty dollars, principal and interest accrued to May 11th, 1910, and for interest thereon from May 11th, 1910, at the rate of 10 per centum, and for the further sum of 10 per centum upon the amount found to be due as attorney's fees.

Third. For judgment in favor of plaintiff F. P. Zollinger, as trustee, for 5 per centum of the amount for which the mortgaged premises shall be sold, but in the event no sale thereof shall be made on account of payment and discharge of the judgment, then for 5 per centum commissions upon the amount of the debt found to be due.

12 Fourth. That the usual decree may be made and entered herein requiring the defendants to pay and satisfy said judgments with interest and costs, within the time limited by law and the practice of the court, and further providing that in default of such payment within such time that the premises described in the said deed of trust shall be sold under the direction and according to the usual practice of the court; that in the event of such sale the proceeds thereof be applied to the satisfaction of the judgment, interest and costs, including attorney's fees and trustee's commission after deducting the costs of such sale, and that the defendants and all persons claiming under them, or either of them, subsequent to the execution of said deed of trust, may be barred and forever foreclosed of all right and equity of redemption in and to the same, with the appurtenances, and every part and parcel thereof; and that the plaintiff The Third National Exchange Bank may have execution against the defendant D. B. Smith for any deficiency that may remain after applying all the proceeds of such sale, properly applicable to such judgment.

Fifth. That plaintiffs have all and every such other and further relief as to the court may seem meet and just.

SEYMOUR THURMOND,
El Paso, Texas;
JAMES H. PAXTON,
R. L. YOUNG,
Las Cruces, N. M.,
Attorneys for Plaintiffs.

13 Verified in the usual form by Seymour Thurmond on the 26th day of August, A. D. 1910.

EXHIBIT "A."

$4500.00. EL PASO, TEXAS, May 11th, 1909.

One year after date, for value received, I promise to pay to the order of W. H. Reinhart of Sandusky, Ohio, the sum of Forty-five hundred dollars in gold coin of the United States of America of at least the present weight and fineness, with interest from date until paid at the rate of eight (8) per centum per annum, interest payable annually, and all past due interest to bear interest from date of accrual until paid at the same rate and in the same manner as the principal. I further agree to pay ten (10) per cent additional upon the amount of principal and interest due hereon as attorney's fees for collection in case this note is not paid at maturity, or when payment may be lawfully demanded, and is placed in an attorney's hands for collection, or in case of institution of legal proceedings to enforce the payment hereof. This is one of three notes, each for the principal sum of forty-five hundred dollars and payable respectively one, two and three years after date, this day given by me in part payment of the purchase price for four hundred and eighty-two and four tenths acres of land, being three tracts, one tract of three hundred and sixty-three and one-tenth acres, one of one hundred and three and three tenths acres, and one of sixteen acres, part of the Refugio Colony Grant in Dona Ana County, Territory of New Mexico, this day sold and conveyed to me by said
14 W. H. Reinhart, and to secure the payment of this, as also the other two notes, a lien upon the land conveyed is reserved in the deed to me and now acknowledged, and in addition thereto, for the purpose of better securing the payment of this and said other two notes, I have made, executed and delivered to F. P. Zollinger, of Sandusky, Ohio, trustee, for the use and benefit of said W. H. Reinhart, or other holder or holders of this note, a deed of trust of even date herewith, whereby I have conveyed in trust to said F. P. Zellinger, trustee, the said lands conveyed to me by said W. R. Reinhart by the deed aforesaid. In the event default is made in the payment of any annual installment of interest accruing on this or on either or all of said three notes, or if default be made in payment of the full amount of principal and interest at maturity of either of said three notes, then in such case the said Reinhart, or other holder or holders of any or all of said notes then outstanding and unpaid, shall have the right and option to declare all of said outstanding and unpaid notes at once due and payable, and enforce the payment thereof the same as though the date of maturity of said notes had accrued and default been then made in the payment thereof, anything in the reading and tenor of said notes, or any of them, to the contrary notwithstanding.

(Signed) D. B. SMITH.

Endorsed: Allen H. Potter. Wm. H. Reinhart. $4500 & 8% Int. May 11, 1910.

15 EXHIBIT "B."

$4500.00. EL PASO, TEXAS, May 11th, 1909.

Two years after date, for value received, I promise to pay to the order of W. H. Reinhart of Sandusky, Ohio, the sum of Forty-five Hundred dollars in gold coin of the United States of America of at least the present weight and fineness, with interest from date until paid at the rate of eight (8) per centum per annum, interest payable annually, and all past due interest to bear interest from date of accrual until paid at the same rate and in the same manner as the principal. I further agree to pay ten (10) per cent additional upon the amount of principal and interest due hereon as attorney's fees for collection in case this note is not paid at maturity, or when payment may be lawfully demanded, and is placed in an attorney's hands for collection, or in case of institution of legal proceedings to enforce the payment hereof. This is one of three notes, each for the principal sum of forty-five hundred dollars and payable respectively one, two and three years after date, this day given by me in part payment of the purchase price for four hundred and eighty-two and four tenths acres of land, being three tracts, one tract of three hundred and sixty-three and one-tenth acres, one of one hundred and three and three-tenths acres, and one of sixteen acres, part of the Refugio Colony Grant in Dona Ana County, Territory of New Mexico, this day sold and conveyed to me by said W. H. Reinhart, and to secure the payment of this, as also the other two notes,

16 a lien upon the land conveyed is reserved in the deed to me and now acknowledged, and in addition thereto, for the purpose of better securing the payment of this and said other two notes, I have made, executed and delivered to F. P. Zollinger, of Sandusky, Ohio, trustee, for the use and benefit of said W. H. Reinhart, or other holder or holders of this note, a deed of trust of even date herewith, whereby I have conveyed in trust to said F. P. Zollinger, trustee, the said lands conveyed to me by said W. H. Reinhart by the deed aforesaid. In the event default is made in the payment of any annual installment of interest accruing on this or on either or all of said three notes, or if default be made in payment of the full amount of principal and interest at maturity of either of said three notes, then in such case the said Reinhart, or other holder or holders of any or all of said notes then outstanding and unpaid, shall have the right and option to declare all of said outstanding and unpaid notes at once due and payable, and enforce the payment thereof the same as though the date of maturity of said notes had accrued and default been then made in the payment thereof, anything in the reading and tenor of said notes, or any of them, to the contrary notwithstanding.

(Signed) D. B. SMITH.

Indorsed: Pay to order of 3rd Nat. Exchange Bank, Sandusky, Ohio. Allen H. Potter. Wm. H. Reinhart. $4500 & 8% int. May 11, 1910.

17 EXHIBIT "C."

$4500.00. EL PASO, TEXAS, May 11th, 1909.

Three years after date, for value received, I promise to pay to the order of W. H. Reinhart of Sandusky, Ohio, the sum of Forty-five hundred dollars in gold coin of the United States of America of at least the present weight and fineness, with interest from date until paid at the rate of eight (8) per centum per annum, interest payable annually, and all past due interest to bear interest from date of accrual until paid at the same rate and in the same manner as the principal. I further agree to pay ten (10) per cent additional upon the amount of principal and interest due hereon as attorney's fees for collection in case this note is not paid at maturity, or when payment may be lawfully demanded, and is placed in an attorney's hands for collection, or in case of institution of legal proceedings to enforce the payment hereof. This is one of three notes, each for the principal sum of forty-five hundred dollars and payable respectively one, two and three years after date, this day given by me in part payment of the purchase price for four hundred and eighty-two and four tenths acres of land, being three tracts, one tract of three hundred and sixty-three and one-tenth acres, and one of one hundred and three and three-tenths acres, and one of sixteen acres, part of the Refugio Colony Grant in Dona Ana County, Territory of New Mexico, this day sold and conveyed to me by said W. H.

18 Reinhart, and to secure the payment of this, as also the other two notes, a lien upon the land conveyed is reserved in the deed to me and now acknowledged, and in addition thereto, for the purpose of better securing the payment of this and said other two notes, I have made, executed and delivered to F. P. Zollinger, of Sandusky, Ohio, trustee, for the use and benefit of said W. H. Reinhart, or other holder or holders of this note, a deed of trust of even date herewith, whereby I have conveyed in trust to said F. P. Zollinger, trustee, the said lands conveyed to me by said W. H. Reinhart by the deed aforesaid. In the event default is made in the payment of any annual installment of interest accruing on this or on either or all of said three notes, or if default be made in payment of the full amount of principal and interest at maturity of either of said three notes, then in such case the said Reinhart, or other holder or holders of any or all of said notes then outstanding and unpaid, shall have the right and option to declare all of said outstanding and unpaid notes at once due and payable, and enforce the payment thereof the same as though the date of maturity of said notes had accrued and default been then made in the payment thereof, anything in the reading and tenor of said notes, or any of them, to the contrary notwithstanding.

(Signed) D. B. SMITH.

Indorsed: Pay to the order of 3rd Nat. Exchange Bank, Sandusky, O. Allen H. Potter. Wm. H. Reinhart. $4500. & 8% int. May 11, 1910.

19 EXHIBIT "D."

THE STATE OF TEXAS,
County of El Paso:

Know All Men by These Presents, That I, D. B. Smith, of said State and County, joined herein by my wife, Gertrude W. Smith, for and in consideration of the sum of Ten ($10.00) Dollars to me cash in hand paid by F. P. Zollinger, trustee, the receipt of which is hereby acknowledged, and for the other considerations and purposes hereinafter set out, have bargained, sold, transferred, assigned, set over and conveyed, and by these presents do bargain, sell, transfer, assign, set over and convey unto said F. P. Zollinger, trustee, of Sandusky, Erie County, Ohio, and to his successors and substitute trustee or trustees, all of those certain tracts, pieces and parcels of land lying and being situate in Dona Ana County, Territory of New Mexico, and all being parts of what is known as the Refugio Colony Grant, or Grant to the Colony of Refugio, and being the same tracts, pieces and parcels of land that were sold and conveyed to me by W. H. Reinhart, of the County of Erie, State of Ohio, by deed of even date herewith, and in which said deed said lands are, and are now here, described as follows:

First. A tract of land containing three hundred and sixty-three and one-tenth (363.1) acres, and being all of a tract of four hundred and fifty-nine and nine-tenths (459.9) acres, embraced within the following field notes:

Beginning at an alamo post for the east corner, standing at the side of an old alamo tree, running thence S. 45° W. 2400
20 feet to a stake for a corner; thence S. 58° W. 1330 feet to a stake; thence S. 11° W. 3130 feet to a post standing on the north bank of the old Rio Grande; thence up the old Rio Grande with its meanders N. 59° W. 990 feet; thence S. 14° E. 830 feet; thence S. 86° W. 280 feet; thence N. 60° W. 600 feet; thence N. 22° W. 580 feet; thence N. 30° 600 feet; thence N. 28° E. 800 feet; thence N. 22° E. 500 feet; thence N. 30° E. 900 feet; thence N. 10° W. 600 feet; thence N. 30° W. 500 feet; thence N. 67° W. 1100 feet; thence S. 30° E. 460 feet; thence S. 62° W. 220 feet; thence N. 70° 250 feet; thence N. 17° W. 440 feet; thence N. 30° E. 630 feet; thence N. 59° E. 860 feet; thence N. 26° E. 640 feet; thence S. 83° E. 610 feet; thence S. 50° E. 250 feet; thence S. 600 feet to a stake standing on the south bank of the said Rio Grande; thence across the bend of the old river N. 42° E. 2300 feet; to a stake for the northwest corner situated in a dense alamo thicket from which an alamo tree marked — bears S. 12° E. 29 feet, another alamo tree marked — bears N. 75° W. 74 feet; and another tree with the same marks bears N. 7½° W. 7 feet; thence S. 80° E. 3600 feet to the place of beginning. Except a certain tract of ninety-six and eight tenths (96.8) acres, included within the foregoing field notes of said four hundred and fifty-nine and nine-tenths (459.9) acres which said tract of ninety-six and eight tenths (93.8) acres is not hereby

conveyed or intended to be conveyed, but is especially reserved and excepted from the lands hereby conveyed, and the description herein given of said ninety-six and eight-tenths (96.8) acres is given for the express purpose of identifying said tract of ninety-six and
21 eight-tenths (96.8) acres and segregating the same from the lands hereby conveyed, and said ninety-six and eight-tenths (96.8) acres is here now described as follows:

Beginning at a post standing on the north bank of an old abandoned channel of the Rio Grande (same being the southeast corner of the above described four hundred and fifty-nine and nine-tenths (459.9) acres tract; thence N. 11° E. 630 varas to the point where it is claimed the northern boundary of grant of land known as the Santa Teresa Grant crosses the eastern boundary of the aforedescribed four hundred and fifty-nine and nine-tenths (459.9) acres tract; thence along and on what is now asserted by claimants of said Santa Teresa Grant to be the northern boundary line of said Santa Teresa Grant; westward to where said asserted or pretended north line of the Santa Teresa Grant intersects said old channel of the Rio Grande, and thence down the center of said old channel of the Rio Grande with its meanders to the place of beginning, said ninety-six and eight-tenths (96.8) acres being a part of and taken off of the southern end of said four hundred and fifty-nine and nine-tenths (459.9) acres tract above described.

Second. All that tract of land containing an area of one hundred and three and three-tenths (103.3) acres, which was acquired by Luis F. Acosta from the Commissioners of the Refugio Land Grant on the fourth day of December, A. D. 1894, by deed of that date, wherein said tract is described as follows:

From east to west on its south side it measures one thousand (1000) yards, and is bounded by lands of Canuto Alvarez;
22 from south to north on its west side it measures five hundred (500) yards, and is bounded by the lines of the Refugio Grant; from west to east on its north side it measures one thousand (1000) yards, and is bounded by vacant land; and from north to south on the east side it measure- five hundred (500) yards, and is bounded by public road and vacant lands.

Third. All that certain tract and parcel of land which was conveyed to Guadalupe Carrasco by the Commissioners of the Refugio Land Grant, by deed dated November 24th, 1888, and therein described as follows: From east to west on the north side it measures three hundred (300) yards, and is bounded by lands of Morris Freudenthal; from north to south on its west side it measures one hundred and fifty (150) yards, and is bounded by lines of the Refugio Colony Grant; from west to east on the south side it measures three hundred and fifty (350) yards, and is bounded by lands of Tranquillo Fierro; and from south to north on its east side it measures three hundred (300) yards, and is bounded by lands of Lorenzo Carrasco.

And I do hereby further convey, set over, assign and transfer to said trustee, in trust, all and every ditch and water rights in any wise pertaining to the lands aforesaid and by me acquired, had and

held under the terms and provisions of the said deed from said Reinhart to me, as well as all and every other ditch, water and irrigation right or concession as may by me be hereafter acquired in connection with my use, possession and occupation of said lands and as appurtenant thereto, during the life or subsistence of this deed of trust and the lien hereby created.

23 To Have and to Hold under said F. P. Zollinger, trustee, and his successors and substitute trustee or trustees, his or their legal representatives and assigns, in fee simple forever, together with all and singular the rights, privileges, hereditaments and appurtenances to the same belonging or in any wise incident or appertaining.

This conveyance is, however, in trust and is made for the purpose of better securing the payment of three certain promissory notes by me, the said D. B. Smith, this day made, executed and given in part payment of the purchase price for the said above described lands, each of said notes being for the principal sum of Forty-five hundred ($4500.00) dollars, bearing interest from date until paid, interest payable annually, at the rate of eight (8%) per centum per annum and payable, respectively, one, two and three years after date to the order of W. H. Reinhart, of Sandusky, Ohio, each of said notes containing a provision for payment of attorney's fees for collection and for maturity of all of said notes outstanding and unpaid in case of default in payment of interest or of any of said notes at maturity.

Now, Therefore, in the event I, the said D. B. Smith, my heirs, legal representatives or assigns shall well and truly pay or cause to be paid each and all of said three notes fully according to the reading and tenor thereof, as and when the same shall become due and payable, or when, for default in interest payments or in full payment of either of said notes at maturity for default of mine in any of the covenants or obligations upon me imposed and by me promised and undertaken according to terms and conditions herein set out,

24 payment of said notes may lawfully be demanded by the payee, W. H. Reinhart, or other holder or holders of said notes, then this conveyance in trust shall be of no further force or effect and shall be canceled and released at the cost and expense of said W. H. Reinhart. It is especially covenanted and agreed, and I, the said D. B. Smith, do hereby especially covenant and agree as follows, to-wit:

First. That I will well and truly pay, or cause to be paid, to said W. H. Reinhart or other holder or holders of said promissory notes all sums and amounts of interest accruing on each and all of said notes annually, as and when the same shall become due and payable, and will well and truly pay the full amount of principal and interest due, and owing upon each of said promissory notes as and when the same shall become due and payable.

Second. That I will likewise, during the life of this contract and deed, pay or cause to be paid, as and when the same shall become due and payable all taxes, assessments, costs, and charges as may be imposed, assessed or levied upon, or against said lands by the municipal, territorial or National Government and officers, and all charges, as-

sessments and costs that may be assessed or levied against said lands or the possessors thereof for ditch, water and irrigation rights and purposes, as and when the same shall be or become due and payable, and will fully and effectually keep, preserve and protect the said lands and all rights and appurtenances thereto appertaining against any and all claims or charges of the nature and character above indicated, and of whatsoever nature or character as may under National, Territorial or Municipal Law be or become a prior or
25 preference lien, or incumbrance upon said lands to the lien hereby created thereon, or that may in any manner or extent affect or tend to affect the value of the security hereby given to secure the payment of said three promissory notes.

In case of any failure or default on the part of me, the said D. B. Smith, to keep and truly perform any and all of the covenants and agreements herein contained and by me agreed to be kept and performed, then and in such case the said Seymour Thurmond, trustee, his successors or substitute trustee or trustees, are hereby fully and especially authorized and empowered, and such authority and power is by me hereby fully granted and delegated and I do hereby make it the special duty of the said trustee, his successors or substitutes at the request of the said W. H. Reinhart or other holder or holders of all or any of said three promissory notes, at any time made after failure or default, as aforesaid, to sell the said lands, rights and properties hereby conveyed in trust, to the highest bidder, for cash in hand paid, at the court house door of the court house of Dona Ana County, Territory of New Mexico, or any such other place as such sales under foreclosure of mortgages or deeds of trust are usually made in said Dona Ana County, after advertising the said property to be sold at the time, place and terms of said sale in such manner and for such time or number of days as sales under deeds of trust are required to be advertised by the laws of said Territory of New Mexico, or in the event the said laws do not prescribe or regulate the manner and length of time in which such sales shall be advertised, then the same shall be advertised by posting written notices of such sale
26 at three public places in the said county of Dona Ana, one of which places shall be the court house door or place where such sales are usually made in said Dona Ana County for twenty days prior to the day of the sale. And it is hereby agreed that the said trustee, or his successor or substitute by whom such sale may be made, shall have the privilege of selling said land and property altogether, in lump, or in such lots or parcels as to him may seem expedient; but in the event the sale shall be in lots or parcels then only so much of said lands shall be sold as shall, at the price bid and paid therefor, be and realize a sufficient sum or sums to pay off and discharge *of* the debt for which such sale is made, together with such attorney's fees, and such costs, charges and expenses, including the trustee's commissions incurred in advertising and making such sale and after sale made as aforesaid, the trustee, his successor or substitute shall, as trustee or substitute trustee as the case may be, shall make, execute and deliver to the purchaser or purchasers good and sufficient deed or deeds in law, but without other clause or

covenant of warranty than against all persons claiming or to claim the same by, through or under me, the said D. B. Smith, to the property so sold, and shall receive the proceeds of such sale or sales and apply the said proceeds as follows: First, to the payment of all costs, charges and expenses incurred in and about the advertisement of said sale, in making said sale, including commissions and attorney's fees, and execution of the conveyance or conveyances to the purchaser or purchasers, and second, to the payment of such sum or sums of principal and interest as may then be owing and
27 unpaid upon said three promissory notes or any of them. The trustee, successor or substitute shall be entitled to a commission of 5 per centum upon the gross proceeds of such sale or sales as compensation for advertising and making the same.

If after payment of the debt, costs, charges, attorney's fees and commissions there shall remain in the hands of the trustee, his successor or substitute, any balance of proceeds of such sale or sales, such balance shall, upon surrender of possession of the property sold to the purchaser or purchasers thereof, be paid over to me, the said D. B. Smith, my heirs, legal representatives or assigns.

Should the said F. P. Zollinger, trustee, on account of his absence, incapacity, inability, disqualification, or for any or on any other reason or account whatsoever, fail or refuse, or be disqualified from acting hereunder, then the said W. H. Reinhart, his legal representative or other holder or holders of the indebtedness or part thereof, evidenced by said three promissory notes, shall have full power to, in writing, appoint one or more substitutes, without notice to me, the said D. B. Smith, and such substitute trustee or trustees shall have the same rights, powers and authority as are hereby granted and delegated to said trustee, F. P. Zollinger. And I, the said D. B. Smith, for myself, my heirs and legal representatives, do hereby absolutely ratify and confirm any and all acts and things that the said trustee, or his successors or substitutes, may do or lawfully cause to be done in the premises in accordance and by virtue hereof.

28 It is further specially agreed and admitted, that in any deed or deeds given by any trustee hereunder, any and all statement of fact or other recitals therein made as to default or defaults by me, the said D. B. Smith, whereby, for such default or defaults, sale is authorized to be made, as to proper sufficient advertisement and advertisement strictly in accordance with law and the terms and conditions hereof and sale made in conformity with the terms and provisions hereof, or as to any other preliminary act or thing having been done or any act, prerequisite, necessary to the validity of such sale, shall be taken by any and all courts of law and equity as prima facie evidence that the said statements and recitals are true and that all and every such preliminary acts and prerequisite to the validity of any such sale or sales made hereunder shall be presumed to have been duly done and performed.

It is further specially agreed, *that* I, the said D. B. Smith, do hereby agree that in the event default shall be made in payment at maturity or date of accrual of any annual instalment of interest becoming due on said three promissory notes, or if default be made

payment in full of the whole amount of principal and interest
ne and owing upon either of said notes at maturity thereof, then
either, or both, such cases the said W. H. Reinhart, or other
older or holders of said notes or any of them, then, at the date
f such default or defaults, shall have and has the option to declare
ll of said notes then outstanding and unpaid at once, by reason
f such default or defaults, due and payable and to demand and
enforce the payment thereof by foreclosure of this deed of
9 trust in the same manner as though each and all of said
promissory notes had run for the full period of time for
hich they are respectively drawn and default been then made in
he payment thereof, anything in the reading and tenor of said
otes or any of them to the contrary notwithstanding.

And it is further agreed, and I, the said D. B. Smith, do hereby agree that if default be by me made in the payment of taxes, assessments or charged, assessed or imposed upon or against the lands and property above described and conveyed in trust, that then, in order to protect and preserve the value of the security hereby given, the said W. H. Reinhart, or other holder or holders of said promissory notes, shall have the right, for protection and preservation of said security, to pay said taxes, assessments or other charges and charge the same against the said D. B. Smith, and in the event of any such payment or payments being made by said Reinhart, or other holder or holders of said notes, or any of them, then upon such payment or payments being made the same shall, from date of payment, bear interest at the rate of 10 per centum per annum and be, with interest, repaid and refunded by said D. B. Smith or out of the proceeds of sale of said property, and in the event of any such default upon the part of said D. B. Smith the said Reinhart or other holder or holders of said promissory notes, or any of them, shall have a like option to declare the whole of the indebtedness evidenced by said three notes, upon and for reason of such default to be due and payable in the same and like manner as is hereinbefore provided in case of default in payment of any annual instalment of interest or
30 in payment in full of either of said notes at maturity. In the event of foreclosure of this deed of trust and sale of the property herein conveyed in trust, the said Reinhart, or other holder or holders of said three promissory notes, or any of them, shall have the right to become the purchaser or purchasers of all or any part of the property offered for sale if he or they shall be the highest bidder or bidders therefor.

In witness whereof, I have hereunto set my hand this 11th day of May, 1909.

(Signed) D. B. SMITH.
(Signed) GERTRUDE W. SMITH.

THE STATE OF TEXAS,
County of El Paso, ss:

Before me, W. M. Butler, a notary public in and for El Paso county, Texas, on this day personally appeared D. B. Smith and

his wife, Gertrude W. Smith, known to me to be the persons whose names are subscribed to, and who executed the foregoing instrument of writing by subscribing their names thereto in my presence, and who acknowledged the said instrument to be their free and voluntary act and deed, for the purposes and consideration therein expressed.

Given under my hand and seal of office, this 7th day of June, 1909.

(Signed) W. M. BUTLER,
Notary Public, El Paso County, Tex.

My commission expires June 1, 1911.

Indorsed: Deed of Trust. D. B. Smith to F. P. Zollinger, Trustee for the use and benefit of W. H. Reinhart. No. 4882. Re-
31. ception, recorded compared indexed. Territory of New Mex., County of Dona Ana. Filed for record in my office this 8th day of June, 1909, at 8 o'clock a. m., and duly recorded in Book No. 11, of Mortgages, page 33, Records of Dona Ana County, New Mexico. (Signed) I. Armijo, probate clerk and ex-officio recorder, Dona Ana County, New Mexico.

And thereafter, on, to-wit, the 14th day of February, A. D. 1913, there was filed in the office of the clerk of said court, in said cause, defendant's first amended answer, which said answer is in words and figures as follows, to-wit:

Answer.

Now come the defendants in the above styled and numbered cause, and upon leave of the court, withdraw their answer filed herein on November 18, 1910, and file the following amended answer, in lieu of their answer filed herein on the 18th day of November, 1910:

I.

Defendant admits as true all the allegations of fact made by the plaintiffs in their complaint, except the allegations that W. H. Reinhart, the payee in said notes sued on herein, on or about the 15th day of June, 1909, and before maturity of either of said notes and before the maturity of any annual instalment of interest
32 accruing thereon, for value, sold, assigned, indorsed and set over, each and all of said notes to plaintiff The Third National Exchange Bank, and that said notes are now owned by said Bank. And the defendants, for answer to said allegations, admit that said notes were indorsed to said plaintiff, but deny that they or either of them have any knowledge or information thereof to form a belief as to the truth or falsity of said allegations as to the time when said notes were indorsed to said plaintiff, whether before or after an instalment of interest was due on said notes and unpaid.

II.

The defendants, by way of separate defense to said complaint, allege that each of said notes was executed in the state of Texas without specifying in any of the said notes the place of payment thereof, and that the defendants then resided and ever since have resided in El Paso county, Texas. That the Congress of the Republic of Texas passed a law which was approved by the president of said republic, January 20th, 1840, and which has ever since been a part of the statutory law of the republic and state of Texas and which is now contained in the Revised Statutes of Texas, duly enacted and becoming law during the year 1895 in Article 3258 thereof, the following provision:

"The common law of England (so far as it is not inconsistent with the Constitution and laws of this state) shall, together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature."

33 III.

And the defendants further allege that the sole and only consideration moving defendant D. B. Smith to make or execute said notes, or any of them, was a conveyance and deed in writing, duly executed, acknowledged and delivered by the payee of said notes, W. H. Reinhart, wherein said Reinhart pretended to convey to the defendant D. B. Smith the lands described in said deed in trust herein sued on. That certain personal property was also conveyed by said deed and fully paid for by the cash payment made by the defendant Smith of $9,500.00, which more than paid for said personal property and in part paid for said land, and the notes sued on as appears from their terms were executed for the remaining purchase money, which the defendant D. B. Smith agreed to pay for said land, and for no other consideration. That said land was not owned by said Reinhart at the time he so pretended to convey the same to said defendant, nor did he have any interest therein, but that the same was then and is now unsurveyed public land of the United States, and was not entered or applied for in whole or in part for a homestead by said Reinhart, nor had he any claim or color of title thereto which was acquired in good faith, nor had he an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the laws of the United States when said indorsement and conveyance and asserted right to exclusive possession there was made and delivered to the defendant D. B. Smith by said Reinhart. And defendant alleges that the execution of said promissory notes sued on
34 by the plaintiff Bank was obtained by W. H. Reinhart, payee, and each of them, in virtue of and through an unlawful assertion of a right to the exclusive use and occupancy of the lands therein described, which said lands were public lands of the United States of America at the time when said attempted conveyance was made, and which right to such exclusive use and occupancy thereof the said Reinhart then and there asserted by at-

tempting to convey said land and deliver such exclusive occupancy of the same to the defendant D. B. Smith, in consideration of his payment of part of the consideration thereof in cash and in part by the execution and delivery to said Reinhart of said promissory notes sued on herein. That the said Reinhart was in the actual exclusive use and occupancy and had fully enclosed said land at the time of so attempting to convey the same to defendant D. B. Smith, and had delivered to said defendant the said conveyance and exclusive use and occupancy of said land, which said Reinhart then held, which delivery thereof was made in pursuance to agreement and contract on the part of said Reinhart to deliver such exclusive possession as a part of said transaction of attempted conveyance thereof, and for which said notes were executed as aforesaid. That at the time of said conveyance, and at the time of the taking of said promissory notes in part payment thereof, the said W. H. Reinhart had no claim or color of title made or acquired in good faith with a view to entry thereof at the proper land office of the United States at the time of asserting said right to exclusive use and occupancy of said land as aforesaid, or at the time he enclosed the same, nor had he at any time theretofore any other claim or color of title made or acquired in good faith to said land so attempted to be conveyed to the defendant D. B. Smith, as aforesaid, but the defendant D. B. Smith alleges that said Reinhart's said assertion of right to such exclusive use and occupancy of said public land of the United States so asserted as aforesaid in his said attempted conveyance and delivery of such exclusive possession to the defendant D. B. Smith was done in violation of the provisions of the penal statutes of the United States of America of February 25, 1885, and that the defendant D. B. Smith is informed and believes and therefore alleges that the plaintiff Bank at the time of taking said notes, if it ever became the owner thereof, has knowledge of all the facts hereinbefore alleged in this paragraph No. III of defendant's answer.

35

IV.

And now these defendants further plead an estoppel against plaintiffs' pleading, and maintaining in this suit that W. H. Reinhart had any claim or color of title made or acquired in good faith to said public land of the United States, described in the mortgage sued on herein, or that plaintiff Bank became a bona fide holder for value of said notes without notice of the illegality of the consideration of said notes, in that defendants allege that to permit such an issue to be tried in this cause would violate the law and public policy of the United States, as expressed in the Act of Congress of the United States of March 3, 1891, Chapter 539, Sec. 4, 26 Statutes 856, entitled "An Act to Establish a Court of Private Land Claims, and to Provide for Settlement of Private Land Claims in Certain States and Territories," in this: That the said tracts of public land of the United States described in the mortgage sued on herein, the exclusive possession of which

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said Reinhart took by enclosure thereof and to which he asserted right to exclusive use and occupancy thereof, and sought to convey to said D. B. Smith and to confer upon him such exclusive use and occupancy under such enclosure, as is hereinbefore alleged, was, prior to the year 1891, and until the adjudication hereinafter pleaded under said Act of March 3, 1891, claimed by those under whom plaintiffs claim through their said mortgage or deed in trust to be a part of what was known as the grant of the colony of Refugio, a grant of land claimed by said colony, including those through whom plaintiffs claim to have been made to them by the proper authorities of the Republic of Mexico before the territory where said land involved in this suit is situated became a part of the United States of America. That the grant to said colony was what is known as a community grant. That while provision was made by said grant for allotments to members of the colony of small tracts in severalty, yet that a large part of said land grant was such as was called "commons" for the use of the colonist and their assigns, as a community, and that persons to whom allotments were made of land in severalty, and their assigns and vendees, became and remained members of said colony, with like interest in said commons and other community interests pertaining thereto as those possessed by the original colonist, all of which appears from
37 the terms of said grant, a translation of which is hereto attached and filed herewith and made a part of this answer, and marked Exhibit "A," for identification. That by the Act of March 7, 1884, of the Legislative assembly of the territory of New Mexico, the owners of lands within the limits of the grant of the colony of Refugio in the county of Dona Ana, New Mexico, were constituted a body corporate and politic under the name and style of the grant of the colony of Refugio, under which name they were authorized by said act to sue and be sued, and to have perpetual possession, which act of incorporation was accepted by the owners of said colony grant lands before the commencement of the proceedings hereinafter described and who organized and elected officers thereunder and acted thereunder in said corporate capacity for many years thereafter and until long after the proceedings hereinafter described. That at the time of said incorporation the said tracts of land, attempted as aforesaid to be conveyed by said W. H. Reinhart to defendant D. B. Smith, and which are described in plaintiff's mortgage or deed of trust herein sued on, were claimed to be a part of said colony grant by said incorporators and owners of land in said grant under a survey made thereof by Elkins and Morman, and approved by the Surveyor General of the United States for New Mexico. That afterwards through sundry conveyances to divers persons, several small tracts of land which compose the tracts of land described in the plaintiffs' mortgage or deed of trust, were held under alleged conveyances from the proper colony authorities by one Leon Alvares, or Albares, who claimed to have purchased said small tracts from the several parties to whom
38 the colony authorities had allotted or conveyed them. That said Leon Alvares executed a deed of conveyance to his wife,

Felicitas Alvares, on December 15, 1898, purporting to convey to her said several tracts of land composing the tracts described in the mortgage sued on herein and other tracts, and the said Leon Alvares and afterwards Felicitas Alvares, claimed ownership of said land through said conveyances and as one of the members of said colony corporation, who owned land within said colony grant, until after the suit for confirmation of said grant was filed and until after the adjudication and completion of the subsequent proceedings in said suit which is hereinafter pleaded.

That on the 28th day of February, 1893, the said corporation, Grant of the Colony of Refugio, and William Dessauer, filed their complaint and suit in the United States Court of Private Land Claims, sitting in the city of Santa Fe, New Mexico, in and for said territory, suing therein for themselves and on behalf of all others who owned or claimed title to all or any portion of that certain private land grant called and known as "Grant of the Colony of Refugio," situated in the county of Dona Ana and territory of New Mexico, either by or under mesne conveyances, inheritance, or otherwise, from the original grantors, and for and on behalf of the inhabitants of said grant under said corporation as a grant of the "Grant of the Colony of Refugio" against the United States under authority of said Act to establish a court of Private Land Claims, and to provide for settlement of private land claims in certain states and territories, and suing and praying for an inquiry into the validity of said grant and for a decision that said grant and
39 the lands embraced in the limits thereof be confirmed unto plaintiffs and other owners of said grant, alleging the limits of said grant to be such as included therein the said tracts of land described in plaintiff's mortgage or deed of trust. A copy of said complaint is hereto attached and filed herewith and made a part of this answer and marked Exhibit "B," for identification. That the United States, at the August term, 1896, of said court, through its attorney, Matt. G. Reynolds, who was duly cited and summoned thereto, appeared in said cause in said Court of Private Land Claims, and filed its demurrer and answer therein, denying the allegations of the complaint and denying that complainant was entitled to the relief prayed for. A copy of said demurrer and answer is hereto attached and filed herewith and made a part of this answer, and marked Exhibit "C," for identification. That at the July term, 1901, of said court, after having heard the pleadings and evidence adduced by the parties, the said court rendered and caused to be entered its decree confirming said colony grant and determining its boundaries, as described in said decree, which boundaries excluded the land involved in this suit. A copy of which decree is hereto attached and herewith filed and made a part of this answer, and marked Exhibit "D," for identification.

That afterwards, to-wit, on the — day of December, 1901, the said court, on motion of the United States, vacated or re-opened said decree of confirmation for the purpose, as expressed in its order, of December —, 1901, of securing, through the appointment of a

commission- and his report to the court, a more definite de-
40 scription and delineation of the east boundary of said grant, to-wit, the Rio Grande Del Norte, as the same was situate in the year 1852. That as a part of said order opening said former decree, it was ordered that Clayton G. Coleman be appointed Commissioner of said court to take testimony of witnesses and to make a survey and to determine and define the position occupied on the land of said river in the year 1852, a copy of which order is hereto attached and herewith filed and made a part of this answer and marked Exhibit "E," for identification.

That afterwards, to-wit, on the 31st day of March, 1902, the said commissioner made and filed in said court his report of his determination of said eastern boundary line of said grant by describing the meanders of said river as it ran in 1852. A copy of which report is hereto attached and filed herewith and marked Exhibit "F," for identification.

That afterwards, to-wit, on the 22nd day of May, 1902, the said court, by its order and decree duly made and entered of record, adopted said report of said Coleman, Commissioner as aforesaid, and decreed that the old river bed described in said report as the location of the river as it ran in the year 1852 constituted and is the proper east boundary of said grant and copying in the said decree the said location of said river by courses and distances, which said decree was by the clerk of the said court certified to the Commissioner of the General Land Office at Washington, D. C., on August 29, 1902, a copy of which order or decree and the certificate of the clerk of said court is hereto attached and herewith filed, and made a part of this answer and marked Exhibit "G," for identification.

41 That afterwards, to-wit, on the 19th day of March, 1903, on motion of the parties thereto and upon their stipulation, the court, by its order and decree then made and entered of record, amended the original and supplemental decrees hereinbfore pleaded, by striking out the provision in the original decree limiting the boundary of the said grant to a position west of the boundary line between the state of Texas, and the territory of New Mexico, and as a part of said amendatory order further ordered and decreed that said original decree of July 13, 1901, as amended by the supplemental decree entered by this court on May 22, 1902, shall, in all other respects, remain as certified *by* the Commissioner of the General Land Office by the clerk of this court on August 20, 1902, which said amendment of said decree was forthwith duly certified to the Commissioner of the General Land Office. A copy of said order is hereto attached and is herewith filed and made a part of this answer, and marked Exhibit "H," for identification.

That the land described in the complaint in this suit is situated within the boundaries claimed by said colony grantees and said complainant corporation in said suit of confirmation, and their successors in title, to be the true boundaries of said colony according to what is known as the Elkins and Mormon survey thereof, prior to said suit for confirmation of said title and the determination of the boundaries thereof, but upon full hearing by said court created as declared

by law for the very purpose of settling such private land claims against the Government of the United States, it was judicially and finally determined that the land on which the plaintiff Bank and Zolinger, trustee, are seeking in this suit to foreclose their
42 alleged mortgage, was no part of said colony grant but was public land of the United States. That said decree was not appealed from by any party thereto, or others having interests in the said decree, and was never set aside by said Court of Claims, but remains in full force and effect as a final decree. That upon said decree becoming final the clerk of said court certified that fact to the Commissioner of the General Land Office with a copy of the decree of confirmation, which plainly stated the location, boundaries and area of said grant, as confirmed. Whereupon the said Commissioner of the General Land Office caused the same to be surveyed by a Deputy United States Surveyor, which survey was duly returned to the office of the Surveyor General of the United States for the District of New Mexico, together with a plat thereof, on December 31, 1903. A copy of which plat is hereto attached and filed herewith, and made a part of this answer, and marked Exhibit "I," for identification.

That thereafter, on February 12, 1904, and for four consecutive weeks thereafter, the Surveyor General for the District of New Mexico gave notice of said survey and that it was on file in his office for public inspection, by publication in the English and Spanish language in the Rio Grande Republican, a newspaper published at Las Cruces, New Mexico, the nearest newspaper publication to said land. That said surveyor general retained said survey on file in his office for public inspection for the full period of ninety days from the date of the first publication of said notice, to-wit, February 12, 1904. That thereafter the commissioner of said colony of Refugio, but no other persons, filed objections to said survey, which
43 objections were forwarded by the surveyor general to the commissioner of the General Land Office and by said commissioner were transmitted to the said Court of Private Land Claims for its examination of the survey, and objections thereto, and proofs that may have been filed or should be furnished. Whereupon said court, upon hearing of said objections determined that said survey was in substantial accordance with said decree of confirmation. Whereupon on May 13, 1904, the United States Surveyor General for the District of New Mexico returned said survey to the Commissioner of the General Land Office, together with his report of the proceedings had with respect thereto, as hereinbefore alleged, after the official survey had been made under said final decree, and the Commissioner of the General Land Office thereafter, and in accordance with said decree and survey after said decree, issued letters patent to said colony for said land within the boundaries of said colony as thus determined.

And now defendants allege that the only alleged title or alleged color of title which said W. H. Reinhart had to said land when he enclosed the same by fence and maintained such enclosure, and when he asserted said right to the exclusive use and occupancy thereof

and by sale and deed of conveyance and delivery, to defendant D. B. Smith, and asserted such exclusive right and attempted to vest the same in defendant Smith, as in this answer has been hereinbefore alleged, was such claim of title as he acquired, as hereinafter alleged, after it had been finally settled by said decree and proceedings as between the United States and all persons claiming title to said land that the said colony grant did not include said
44 land, and that the same was public land of the United States, of all of which said Rinehart and plaintiff Bank had notice and well knew at the time and ever since the said Reinhart enclosed and maintained his enclosure of said land and asserted the right of exclusive use and occupation thereof in and through his said acts in attempting to convey to defendant D. B. Smith, and to vest him with such claimed right of exclusive use and occupation of said land.

That as hereinbefore alleged Leon Alvares, at the time of the commencement of said proceedings, claimed to own the tracts of land which together compose the tracts of land described in plaintiff's said mortgage or deed of trust. That Leon Alvares was one of the persons who became a member of said corporation under the said Act of the Legislative Assembly of New Mexico of March 7, 1884, and who remained a member thereof, after acquiring said claims to said land through and under other members of said colony. That during the pendency of said suit said Leon Alvares executed a conveyance of said land to Felicitas E. Alvares, his wife, on December 15, 1898, and she continued to hold said claim of said Leon Alvares to said land, subject to whatever adjudication might be made with reference thereto in said suit, until after the final decree in said suit was rendered, and until after ninety days from the publication of notice of the official survey of said land in accordance with said decree was made. That she did not file any objections to said survey except as she may have been included and represented by the objections filed as hereinbefore alleged by the commissioners of said Colony, which were not sustained but overruled by said Court
45 of Private Land Claims.

That on the 10th day of May, 1904, the said Felicitas E. Alvares executed her deed of conveyance for the nominal consideration of one dollar, purporting to convey by way of partition among her nine children as a gift to them of one-ninth interest each in numerous tracts of land including the tracts which compose the land described in complainant's mortgage, the vendees therein named being as follows: Cunuto Alvarez, Dionisio Alvarez, Simon Alvarez, Luis Alvarez, Jose Alvarez, Laura C. Alvarez, Maximo Alvarez, Felicitas Alvarez, and Josefa Alvarez de Ochoa.

That afterwards each of said vendees on November 5, 1907, executed to H. M. Maple a quitclaim instrument wherein by the terms thereof they said that they did thereby "grant, bargain, sell, convey, remise, release and forever quit claim without future responsibility unto the said party of the second part (who was said H. M. Maple) and to his heirs and assigns, all the right, interest, estate, claim and demand, both in law and in equity, and as well in possession as in expectancy" of said grantors, the several tracts of land composing

the tracts of land described in the complainant's mortgage as well as other tracts of land. That said H. M. Maple afterwards, to-wit, on the 9th day of January, 1908, obtained from said Refugio Colony Grant Corporation a quit claim deed to the several tracts of land composing the tracts of land described in complainant's said mortgage or deed of trust, known as "El Bosque del Gato" tract, reciting prior conveyances by said Colony authorities of the same land to sundry persons who had conveyed to Leon Alvarez "heirs to H. M. Maple, and conveying to H. M. Maple all the right, title and
46 interest of the said Colony Grant Corporation in and to said land, which is described as being within the original exterior boundaries of the Refugio Colony Grant."

That afterwards, on said 9th day of January, 1908, said H. M. Maple executed to Allen Potter his quit claim deed to said land and to other tracts of land, but wherein said land is described by reference to the deeds of conveyance from the Colony Grant authorities to the sundry individual colonists who conveyed the same to Leon Alvarez, through whom said H. M. Maple acquired the original claim of said sundry purchasers from the Colony which acquisition thereof by said Maple defendants allege was after it had been adjudicated to be public land, and which deed of said Maple to said Allen Potter also further described the land therein conveyed by reference to the said quit claim deed from said Colony Grant Corporation to H. M. Maple, hereinbefore described, and in which it was recited that all of said land had been conveyed by the Colony Grant to sundry individuals who had conveyed to Leon Alvarez, whose claim H. M. Maple had acquired, and in which quit claim deed of said Colony Grant Corporation to H. M. Maple it was recited that said land was within the original exterior boundaries of the Refugio Colony Grant.

That afterwards, to-wit, on the 25th day of January, 1909, the said Allen Potter executed his deed of conveyance of said land to W. H. Reinhart, reciting therein that said land was situated within the limits and boundaries of what is known as the Elkins and Mormon survey of the grant of land made to the Colony of Refugio and called the Refugio Colony Land Grant, which Elkins and Mormon survey defendants allege described the boundaries con-
47 tended for by the Colony authorities in said suit, hereinbefore pleaded, to have said Colony Grant confirmed, but which boundaries were disregarded in the decree determining the true boundaries of said Colony Grant, thus leaving out of said Colony Grant as confirmed the land described in complainant's complaint as well as much of the other land which was by said Elkins and Mormon survey included within the supposed boundaries of said Colony Grant.

That said deed of said Potter to said Reinhart also referred to the quit claim deed from the Refugio Colony to H. M. Maple as part of the vendor's title, which deed has been hereinbefore described and also to the deed of H. M. Maple to said Potter.

That afterwards, to-wit, on the 11th day of May, 1909, the said W. H. Reinhart executed his conveyance to defendant D. B. Smith,

purporting to convey to said D. B. Smith said tract of land described in said complainant's complaint herein, and referred to the deed of said Potter to said Reinhart, but in his said deed said Reinhart expressly stipulated that nothing therein contained should be construed or at any time or place be held to be a, or any, covenant or covenants of warranty upon the part of the grantor, and that the words bargain, sell and convey are used herein as words of conveyance simply, and not as words of warranty.

And these defendants further allege that the mortgage and vendor lien notes sued on by complainants were part of one contract which also included the deed from W. H. Reinhart to D. B. Smith, which has been hereinbefore described, and which deed refers to the source of the alleged claim of title of said W. H. Reinhart through
48 H. M. Maple, the said notes reciting that each of them is one of three notes of even date given in part payment by the maker for said tracts of land on the same day sold and conveyed to D. B. Smith by said W. H. Reinhart, and that to secure the payment thereof a lien upon said land conveyed is reserved in the deed of said Reinhart to D. B. Smith, and that in addition thereto, for the purpose of better securing the payment of said notes, the maker had executed to F. P. Zollinger, trustee, for the use and benefit of said Reinhart, or other holder or holders of said notes, a deed of trust of even date of said notes, whereby said Smith conveyed in trust to said Zollinger, trustee, the said lands conveyed to said Smith by said Reinhart, through which recitals the plaintiff Bank had notice of the consideration moving to the execution of said notes, and through the chain of alleged title down to said D. B. Smith and the recitals therein, which have been hereinbefore alleged, the plaintiff Bank had notice of the location of the land for which said notes were given as well as of the statute creating said Court of Private Land Claims and the effect of adjudication thereunder.

And defendants further allege that they are informed and believe, and upon such information and belief allege that prior to the execution of said notes said Reinhart was indebted to the complainant Bank in large sums of money, the exact amount of which is unknown to the defendants, and that said Reinhart, before said notes were executed to him, brought to the knowledge of said Bank said tracts of land and his intended sale thereof, and contracted and agreed with said complainant Bank to make said sale, and
49 to take notes in part payment of said land and to turn over to said Bank the said notes in payment of, or as security for, his indebtedness to said Bank, and that when said sale was made the said Reinhart, in pursuance of said agreement, had the plaintiff F. P. Zollinger, who was then cashier of the plaintiff Bank, made the trustee in said mortgage and deed of trust given by the defendant D. B. Smith to secure the payment of said notes to said Bank, and that said notes when taken by said Reinhart, with his name inserted as the nominal payee, were really taken by said Reinhart for said Bank, in pursuance to said agreement, and were held by said Rein-

hart in trust for said Bank and were equitably owned by said Bank until he formally indorsed or otherwise transferred said notes to said Bank, and that said Bank came in real privity with the chain of transfers of said land and all adjudications affecting the same by and through said contract and agreement, when said deed by Reinhart was made to D. B. Smith, and when said Smith executed said mortgage or deed in trust and said notes before said notes were formally indorsed or transferred to said Bank, and that no new rights were acquired by said Bank by said formal indorsement or assignment of said notes. That in any event the said Bank had notice and knowledge before taking said notes that the consideration for the same was said unlawful sale and assertion of claim and right of exclusive use and occupation of public land of the United States without claim or color of title acquired in good faith as alleged in paragraph No. III of this answer.

50 Wherefore, defendants pray that by reason of the said adjudication that said land was no part of the Refugio Colony Grant, and the declared purpose of the law to have all good faith contentions against the United States as to Spanish and Mexican grants settled and forever put at rest by such adjudication, that plaintiffs may be held estopped to plead or contend in this case that there was any claim or color of title held or acquired by Reinhart or D. B. Smith, or others, to the land described in the complaint, in good faith, after said adjudication and public notice of the boundaries established and failure on the part of those through whom plaintiffs deraign their alleged claim of title to appear and contest said boundaries or to appeal from the decisions as to said boundaries, and that, in any event, the court may find that plaintiffs had such notice of the consideration for said notes and mortgage and of the fact that the land was public land of the United States as requires the court to find that such claim as plaintiffs acquired was not acquired in good faith and did not constitute color of title acquired in good faith, and that plaintiffs be adjudged to take nothing by their suit.

F. G. MORRIS AND
HOLT & SUTHERLAND AND
SAM B. GILLETT,
Attorneys for Defendants.

THE STATE OF TEXAS,
County of El Paso:

F. G. Morris, being first duly sworn, deposes and says: That he is an attorney for the defendants in the above and foregoing action; that he has read the defendants' foregoing amended answer and that the matters and things therein stated are true of

51 his own knowledge except as to those matters and things stated on information and belief, and as to those matters he believes them to be true. Affiant further says that he makes this affidavit because of the fact that the said defendants are not in Dona Ana county, state of New Mexico.

F. G. MORRIS.

Subscribed and sworn to before me this the 13th day of February, 1913.

[SEAL OF NOTARY.] E. W. EARL,
Notary Public, El Paso County, Texas.

My Commission expires June 1st, 1913.

EXHIBIT "A."

God and Liberty, Chihuahua, June 4th, 1851.

Amado de la Vega.

Jose Maria Garcia, Esq., and other citizens who sign the said petition:

In the Civil Colony of Refugio, on the twentieth day of the month of February, one thousand eight hundred and fifty-two, I, citizen Ramon Ortiz, permanent Curate of Paso del Norte, appertaining to the Republic of Mexico, General Commissioner appointed by the high Government of the Mexican Union to found and establish civil colonies in the State of Chihuahua, according to the legal regulations issued for that purpose and those in force in our legislative codes; in view of the powers with which I am vested in the premises by the General Organic law dated August nineteenth, one thousand eight hundred and forty-eight, and the derivative regulation of
52 May twenty-second, one thousand eight hundred and fifty-one, this colony being already established and greatly increased and also the distribution of suertes of land and residence lots among its settlers having been effected after the designation of localities for town-houses, churches, etc., and the granting of eight suertes of land for corporation funds should proceed and did in fact proceed to execute the assignment of commons to which said settlement is entitled, and as according to what is set forth in the twenty-fourth and twenty-fifth articles of the decree of November sixteenth, one thousand seven hundred and eighty-six, the egido (common) is the ground lying on the suburbs of cities, towns, and places, which is not cultivated nor planted, I therefore designate to the aforesaid colony of Refugio, one league and a quarter for its commons, the measurement of which being that prescribed by the twenty-third article of the State law of December twenty-third, one thousand eight hundred and fifty-one, for the benefit of settlements containing over one thousand souls, was then commenced and assigned from the exterior of the outer limits of the property or possessions already distributed observing the character and the cuadrilateral configuration of the lands distributed in as much as it could not be made into a perfect square, it must be borne in mind that the arable lands of said colony of Refugio has in length six thousand nine hundred varas from north to south and two thousand four hundred and seventy-five varas from east to west, and consequently an area of seventeen million eighty-seven thousand five hundred square varas. The figure and the limits of the tract being known and taking into

consideration that towards the river side there is not sufficient
53 public land to mark out the common on that side, the three thousand one hundred and twenty-five varas that ought to have been measured on that side are added to a like number on the northern side, that is to say, measuring six thousand two hundred and fifty varas from the lands of Jose de la Luz Jaques, or more plainly, from the point corresponding on a direct line of this land running from east to west, thence following the side of the river will make six thousand two hundred and fifty varas, at which final point the proper land-marks will be raised, after which from the limits of the land of Jose Marquez, which is situated at the edge of the hills towards the west, there will be measured three thousand one hundred and twenty-five varas, and as many more on the south side, from the limits of the land of Jose Maria Garcia, where the said land-marks will also be raised. Lastly for wood-land and common pasturage, of which mention is made in the decree of the fourteenth day of May, one thousand eight hundred and four, and the regulations hereinbefore cited of the twenty-second of May, one thousand eight hundred and fifty-one, I designate the entire Bosque and the strips of land lying between the arable land and the river from the commencement and end of the arable land embracing its whole length. I likewise designate for public lawn and grounds the adjacent brows and slopes of the hills situated on the west on a longitudinal extension, following the course of the summit equal to the common pasture ground designated on the side of the river. The right of pasture and other concessions which I hereby stipulate in favor of this new settlement, in the name of the Federal Government and of the
54 State of Chihuahua, is perpetual and imprescriptible, founded upon the consent of the supreme authorities and on the letter of ancient and modern legislation. In view of all which from this day the aforesaid settlement of Refugio remains in the most ample possession of the tract to which it is entitled by law under the restriction that it cannot alienate the same in any manner to any church, monastery, ecclesiastical person, community or into any other mortmain, so called, as this is prohibited by law. And for the due testimony and validity and authenticity I issue this title which remains recorded in the book of records of the municipality, authorizing the free use and benefit of the lands which have been granted to it. In testimony of which I sign the same at the town and on the date aforesaid.

RAMON ORTIZ.

A faithful and legitimate copy, taken from its original to which I refer.

Colony of Refugio, August 19, 1852.

RAMON ORTIZ.

Doctor Mariano Samaneigo, Political Chief of the District of Bravos, State of Chihuahua, Mexico, certifies:

1st. That Curate Ramon Ortiz was a lawful Commissioner of the

General Government of Mexico, to establish the Civil Colonies of Refugio and others which now appertain to the United States.

2nd. That the preceding signature is that which Mr. Ortiz has used and uses in all his business transactions wherefore the foregoing document is legal.

He gives this at the solicitation of Messrs. Jose Ma. Garcia,
55 Pedro Telles and Simon Henriquez, for such purposes as they may deem proper to make of it.

Paso del Norte, Sept. 11th, 1871.

MO. SAMANEIGO,

L. VELARDE,
Acting Secretary.

U. S. Consulate at Paso del Norte, Mexico.

I, Edwin Lyon, Consul for the United States of America, do hereby certify that the above signature of Mo. Samaneigo is genuine.

Witness my hand and official seal this 11th day of Sept., 1871.

[SEAL.] EDWIN LYON, *Consul.*

EXHIBIT "B."

TERRITORY OF NEW MEXICO:

In the United States Court of Private Land Claims Sitting at the City of Santa Fe, New Mexico, in and for said Territory.

No. —.

THE GRANT OF THE COLONY OF REFUGIO and WILLIAM DESSAUER, Plaintiffs,

vs.

THE UNITED STATES, Defendant.

Petition.

To the Honorable Joseph R. Reed, Chief Justice; Wilbur Stone, William W. Murray, Thomas B. Fuller, and Henry C. Sluss, Associate Justices of said Court:

The "Grant of the Colony of Refugio," a corporation duly organized under and by virtue of Chapter 48, of the local and special laws of New Mexico of 1884, approved March 7th, 1884, page 170, of said Local and Special laws and doing business in said Territory under said act of Incorporation, to which reference is hereby
56 made; and William Dessauer, a resident of the County of Dona Ana in the Territory of New Mexico, plaintiffs, bring this their petition for themselves and for and on behalf of all others who own or claim title to all or any portion of that certain private land grant called and known as the "Grant of the Colony of Refugio" situated in the county of Dona Ana and Territory of New Mexico and

hereinafter more particularly described, either by or under mesne conveyances, inheritance or otherwise from the original grantors and for and on behalf of the inhabitants of said grant under said corporation as a grant of the "Grant of the Colony of Refugio" complain of the United States, and respectfully represent and show unto this Honorable Court:

That prior to June 4th, 1851, divers persons, citizens of the Republic of Mexico, colonized and settled in and upon the lands of the said grant hereinafter described.

That on June 4th, 1851, upon petition from said settlers and colonists a decree was rendered by the proper authority directing the Curate Ramon Ortiz to proceed to said lands and confirm to said settlers the right to the grant upon which they had settled as colonists, as will more fully appear by a copy of said decree on file in the office of the surveyor-general at Santa Fe, and a certified translation and copy of the same hereto attached, marked Exhibit "A."

That on the 20th day of February, 1852, the said Ramon Ortiz, General Commissioner, etc., in pursuance of the provisions of said decree and of the powers and duties as such commissioner proceeded to set aside and confirm to said colonists said land to which
57 they were entitled, that is to say: one league and a quarter for the commons or lands not cultivated nor planted in addition to the lands at that time held and owned by said colonists, the entire tract of arable and common land being described by said commissioner in said grant in words, as follows: "From the exterior of the outer limits of the property or possession already distributed observing the character and the quadrilateral consideration of the lands distributed inasmuch as it could not be made into a perfect square; it must be borne in mind that the arable land of the said 'Colony of Refugio' has in length 6900 varas from north to south and 2475 varas from east to west and consequently an area of 1787500 square varas. The figure and the limits of the tract being known and taken into consideration that towards the river side there is not sufficient public lands to mark out the common on that side the 3,125 varas that ought to have been measured on that side are added to a like number on the northern side, that is to say: measuring 6,250 varas from the lands of Jose de la Luz Jaquez or more plainly from the point corresponding on a direct line of this land running from east to west thence following the side of the river will make the 6,250 varas at which final point the proper landmarks will be raised. After which, from the limits of the land of Jose Marquez which is situated at the edge of the hills towards the west there will be measured 3,125 varas and as many more on the south side from the limit of the land of Jose Maria Garcia where the said landmark will also be raised, lastly for woodland, and common pasturage XXXI designate the entire bosque and strips of land lying between arable land and the river from the commencement
58 and end of the arable land embracing its whole length. I likewise designate for public lawn and grounds the adjacent brows and slopes of the hills situated on the west in a longitudinal extension following the course of the summit equal to the common

pasture grounds designated on the side of the river," which said description is more fully set up in a copy of said grant on file in the office of the surveyor-general at Santa Fe, a certified translation of a copy of the same being hereto attached and marked Exhibit "B," and by official survey of same in office of surveyor-general at Santa Fe, and plat hereto attached marked Exhibit "C." That by the said Grant the said Ramon Ortiz confirmed to the said colonists the lands above described in severalty and in common the lands in severalty being confirmed by deeds describing the same which are ready to be produced here in court whenever this Honorable Court may so direct.

That these lands so described were granted to the said "Grant of the Colony of Refugio" as agricultural, pastural, common and woodlands thereof and are situated within the county of Dona Ana and Territory of New Mexico as aforesaid, lying, adjoining and to the north of the Texas state line, on the west side of the Rio Grande river.

That the said corporation so incorporated as the "Grant of the Colony of Refugio" on March 7th, 1884, has since that time and up to the present time proceeded and acted and is now acting in full accordance with the provisions of said act of incorporation.

That the descendants and assignees of the original grantees
59 deriving title from the said Ortiz are now and have been since the date of said grant in possession in severalty or in common of all the lands embraced within the limits of said grant as defined by the said Ortiz. That the plaintiff William Dessauer is one of the owners of said land and holds — severalty several different tracts of the same fully described and set up in various deeds from divers parties, holding title under the original settlers and colonists, to whom the land was set aside by Ortiz as Commissioner, which said deeds said William Dessauer offers to produce as this court may direct.

That all the papers, documents and decrees relating to this grant the "Grant of the Colony of Refugio" are on file and on record in the archives of the Republic of Mexico.

That the lands embraced within the limits and boundaries of the said "Grant of the Colony of Refugio" are non-mineral in character.

That the original grantees of said grant complied with and performed all the conditions required of them to perfect their title to the said original settlers and colonies, the original grantees from Ortiz as aforesaid, their heirs and assigns, have remained continuously in possession of the lands allotted to them in severalty and also of the unallotted and common lands of the said grant, until the time of the filing of this petition and have continuously cultivated and improved and made their homes upon the same. And that this grant and claim is a perfect one.

That there are no persons known to plaintiffs in possession of or claiming the said land or any part thereof otherwise than
60 by the permission of plaintiffs and the other owners of the said grant in whose behalf plaintiffs bring suit. That to the knowledge of plaintiffs this claim or "Grant of the Colony of Re-

fugio" has never been considered, confirmed or acted upon by Congress or other authorities of the United States and that a survey of the same was ordered and made by the United States and approved April 5th, 1879, and said claim and grant was approved by Jas. K. Proudfit, Surveyor Gen'l May 18th, 1874, reference being had to opinion on file in surveyor-general's office at Santa Fe.

Plaintiffs therefore pray that this petition and the matters and things therein stated be considered by this court and validity of this "Grant of the Colony of Refugio" be inquired into and decided, and that the said grant and the lands embraced in the limits thereof be confirmed unto plaintiffs and the other owners of said grant, and for such other and further relief as may seem meet and proper.

ALBERT B. FALL,
Counsel for Plaintiffs.

P'ffs: Wm. Dessauer, Grant of Colony of Refugio, Las Cruces, N. M.
Jesus Ochoa, Jesus Henriquez, Jose Arias, Commissioners.

Endorsement on back: 150 File 1. In the U. S. Court of Private Land Claims. The "Grant of the Colony of Refugio" No. 90 and William Dessauer vs. United States. Petition. Filed February 28-93. James H. Reeder, Clerk by Ireneo L. Chavez, Dpty. Albert B. Fall, Counsel, for Pffs., Las Cruces, New Mexico.

61 *Summons—U. S. Court of Private Land Claims.*

In the U. S. Court of Private Land Claims.

UNITED STATES OF AMERICA,
District of New Mexico, ss:

THE GRANT OF THE COLONY OF REFUGIO, Plaintiff,
versus
THE UNITED STATES OF AMERICA, Defendant.

Petition Filed in the Clerk's Office, This 28th Day of February, A. D. 1893.

The President of the United States of America to Matt G. Reynolds, Esq., Attorney for the United States Before the Court of Private Land Claims, Greeting:

You are hereby notified that an action has been brought in said Court, by the Colony of Refugio, Plaintiff, against you as Defendant, under the provisions of the Act of Congress of the United States, entitled "An Act to establish a Court of Private Land Claims, and to provide for the settlement of Private Land Claims in certain States and Territories," approved March 3rd, 1891, and that a copy of the petition of said plaintiff is herewith attached and served upon you,

and that you are required to appear and plead, demur or answer to the petition filed in said action, in said Court within thirty days from the date of service of this Summons upon you; and if you fail to do so the said plaintiff will take default according to the provisions of the aforesaid Act.

Witness, The Honorable Joseph R. Reed, Chief Justice of the Court of Private Land Claims, and the seal of the said Court, at the City of Santa Fe, in said District, this 24th day of March,
62 A. D. 1893, and of the Independence of the United States the 117 year.

JAMES H. REEDER, *Clerk,*
By IRENEO L. CHAVEZ,
Deputy Clk.

Proof of Service.

UNITED STATES OF AMERICA,
District of New Mexico, ss:

April 1st, A. D. 1893, I hereby Certify, That I received the within writ on the 1st day of April, A. D. 1893, and that I have personally served the same upon the said defendant U. S. by delivering to — served on me this — day of April 1893.

MATT G. REYNOLDS,
U. S. Attorney.

— personally, a true copy of the within writ, at the time and place as follows: As to — at —, County of — on the — day of — A. D. 189-, As to — —. This writ, therefore, returned April 21st, as the law directs, this 21st day of April A. D. 1893.

Marshal's Fees.

Service — defendants, at $2.00..... $—
Mileage — miles at 6c. going only..... $—

TRINIDAD ROMERO, *Marshal,*
By SERAPIO ROMERO,
Deputy Marshal.

Summons, $4.00; Total, $4.00. Paid by —— ——.

Endorsement on Back: Gen. No. 150. F. No. 4. U. S.
63 Court of Private Land Claims. District of New Mexico. The Grant of the Colony of Refugio, Plaintiff, versus The United States of America, Defendant. Summons. Filed in the office of the Clerk, Court of Private Land Claims, April 21st, 1893, James H. Reeder, Clerk, by I. L. Chaves, Deputy. A. B. Fall of Las Cruces, Attorney for Plaintiff.

EXHIBIT "C."

UNITED STATES OF AMERICA, *ss:*

In the Court of Private Land Claims, Santa Fe District, August Term, 1896.

No. 150.

THE GRANT OF THE COLONY OF REFUGIO et al., Complainants,
vs.
UNITED STATES, Defendant.

The Grant of the Colony of Refugio. (Grant.)

Answer.

Comes now the United States by its attorney, Matt. G. Reynolds, and for answer to the petition filed in the above entitled cause says: That as to the several matters and things alleged in said petition, defendant has no knowledge or information sufficient to enable it to form a belief as to the truth thereof, and it accordingly denies each and all of said allegations and prays that complainants be put to their proof of the same, as is provided by the Act establishing this court. And this defendant, further answering denies that the complainant is entitled to the relief or any part thereof in his petition alleged and prayed for, and prays the same advantage of this answer as if it had been pleaded or demurred to the said petition.

64 Now having fully answered, it prays the Court that a decree may be entered rejecting the claim for said alleged grant and dismissing the petition, and for such other orders as to the Court may seem meet and proper and which it may be authorized to make in the premises.

MATT G. REYNOLDS,
U. S. Attorney.

Endorsed on back: Case No. 150. File No. 6. Court of Private Land Claims. The Grant of the Colony of Refugio et al., Complainant, vs. The United States, Defendant. The Grant of the Colony of Refugio. Answer. Filed in the office of the Clerk, Court of Private Land Claims Dec. 29th, 1896. Jas. H. Reeder, Clerk. I. L. C. Matt. G. Reynolds, U. S. Attorney.

EXHIBIT "D."

In the United States Court of Private Land Claims, Sitting at Santa Fe, New Mexico, at the July Term Thereof, 1901.

No. 150.

THE CORPORATION OF REFUGIO et al., Plaintiff,
vs.
THE UNITED STATES, Defendant.

The Refugio Civil Colony Grant.

This case having on a former day been heard and fully submitted to the court, and now coming on for decision, the claimants appearing by Mr. A. B. Fall, and the defendant by Matt G. Reynolds, United States Attorney, and the court having seen and heard all of the evidence introduced, and having heard the arguments of
65 counsel, and being now fully advised in the premises; find that in the year 1852 such proceedings were had by the proper authorities of the Mexican Government that a grant of lands was made to certain persons constituting a colony known as the Refugio Colony, and said persons were duly placed in juridical possession of said lands; that said grant was made under the decree of the Mexican Government promulgated by Jose Joaquin de Herrera, President of the Republic of Mexico, dated August 19th, 1848, and the regulations of the State of Chihuahua, issued in pursuance of said decree, May 22nd, 1851; that said grant was made and juridical possession thereof delivered by a duly appointed commissioner of the State of Chihuahua, in accordance with said decree and said regulations; that said grant was a colony grant, and was made for the benefit of all persons so placed in possession, and their heirs and successors, and was made in two tracts, one of agricultural land for the purpose of cultivation, and one of pasture and woodland for the common benefit of the residents of the said Refugio Colony; that all of said agricultural land was allotted to and distributed among the persons composing said colony, by the said commissioner at the time said grant was so made; that said grant was duly located and recorded, was complete and perfect at the date of the treaty of December 30th, 1853, between the United States and Mexico, known as the Gadsden purchase, under which the United States acquired sovereignty over the territory in which the lands in question are situated; and that all the conditions annexed to said grant *and* had been at the date of said treaty performed; that the corporation of
66 Refugio, one of the claimants in this case, is a duly organized corporation, and has succeeded to all the right, title and interest of the said Refugio Colony, and has now such interest in the property in question under said grant, as entitles it to maintain this action.

It is therefore by the court adjudged and decreed that the said

grant be and the same is hereby confirmed, as to the agricultural land thereof hereinafter designated and described as "tract No. 1" to the corporation of Refugio in trust for the persons to whom the same was allotted as aforesaid, and such other persons as were bona fide residents upon the same at the date of the said treaty, and the heirs and successors in interest of such persons; and as to the pasture and woodland hereinafter designated and described as "tract No. 2" to the corporation of Refugio absolutely, the same being limited to one square league.

The lands so confirmed are more particularly described as follows:

Tract No. 1.

Beginning on the west bank of the Rio Grande del Norte as the same was situated in the year 1852 at the point where the south boundary of the agricultural land allotted to Jose Maria Garcia on an eastern extension of said boundary reaches the said western bank of said river; thence for the southern boundary running west along the said south boundary of the said allotment to a point at the foot of the slope or drainage of the hill where is the western limit of the agricultural lands; thence for the western boundary, in a northerly direction along the slope or drainage of the hills, which is
67 the western limit of the agricultural lands to a point where the north boundary of the agricultural land allotted to Jose de la Luz Jaquez which is three hundred (300) yards north of the head or intake of the Los Amoles irrigating ditch, or the western prolongation of said boundary reaches the slope or drainage of the hills; thence for the north boundary, east to the west bank of the Rio Grande del Norte as the same was situate in the year 1852; and thence for the east boundary in a southerly direction along the said west bank of the said river to the point of beginning.

Tract No. 2.

The north boundary of tract No. 1 hereinbefore described shall be the south boundary of tract No. 2, and a north and south line through the northwest corner of said tract No. 1 shall be the western limit thereof. The eastern boundary of said tract No. 2 shall be the west bank of the Rio Grande del Norte as it was situated in 1852, and the said tract shall extend far enough north to embrace one square league, having the north boundary thereof parallel to its southern boundary. In the event that the old river bed mentioned as the east boundary of said two tracts shall be found at any point to lie within the State of Texas, then the east boundary of this grant shall to that extent be the west boundary of Texas instead of said old river.

This decree of confirmation shall not and does not confer upon the original grantees, its successors, assigns and legal representatives, any right or title to any gold, silver or quicksilver mines or minerals

of the same situate in, upon or within the premises herein
68 described, all such mines and minerals remaining the property of the United States.

(Sigend) JOSEPH R. REED,
Chief Justice.

EXHIBIT "E."

No. 150, 193.

THE GRANT OF THE COLONY OF REFUGIO et al
versus
THE UNITED STATES.

Refugio Colony Grant.

This cause coming on this day to be heard on the motion of the United States to vacate and set aside the decree of confirmation heretofore entered in said cause for the purpose of securing through the appointment of a commissioner and his report to the court a more definite description and delineation of the east boundary of said grant, to-wit, the Rio Grande del Norte as the same was situate in the year 1852; and it appearing to the court that said motion is proper.

It is ordered by the court that the same be and it is hereby sustained, and that said decree heretofore entered by the court be and the same is hereby vacated and set aside and said cause is hereby reopened for further proceedings.

It is further ordered that Clayton G. Coleman be and he hereby is appointed a commissioner of this court, with power and direction to go upon the premises, take testimony of witnesses, under oath, and by accurate survey and otherwise, ascertain and determine the middle or thread of the Rio Grande del Norte as the same existed at the date of the grant, to-wit, in 1852, and thereupon to
69 make his report of his examination, investigation and survey, together with a definite recommendation to the court as to the proper line, by courses and distances to constitute the east boundary of said grant. It is further ordered that the clerk of this court do transmit a certified copy of this order to the Commissioner of the General Land Office, with a request that the certified copy of the decree heretofore forwarded by him to said Commissioner, be returned to this court for further proceedings of the nature indicated by this order.

(Signed) JOSEPH R. REED,
Chief Justice.

EXHIBIT "F."

Santa Fe District.

Nos. 150 and 193.

THE GRANT OF THE COLONY OF REFUGIO et al.
vs.
THE UNITED STATES.

Refugio Colony Grant.

To the Honorable Joseph R. Reed and Associate Justices of the Court of Private Land Claims:

In obedience to instructions contained in your order, dated Dec. 13th, 1901, appointing me a Commissioner of your Honorable Court, a copy of which is herewith submitted, marked Exhibit "A," I have the honor to report that having previously posted notices at Anthony, N. M., and other places in the vicinity, a copy of which is also herewith submitted, marked Exhibit "B," I went upon the ground January 3rd, 1902, and having secured the services of one of the original allottees of the Refugio Colony Grant who has resided on said grant continuously from the year 1851 to
70 the present time, and of the son of another one of the original allottees, who has lived there continuously from the year 1858, I proceeded to locate and survey the southern boundary of the original allotment made to Jesus Maria Garcia in 1852 by Ramon Ortiz, Commissioner of the State of Chihuahua, Mexico, which allotment was known as "La Isla," from the present bed of the Rio Grande del Norte as it ran in the year 1852, and in like manner the north boundary of the allotment made to Jose de la Luz Jaquez at the same time and by the same Commissioner. I also surveyed a line along the center of the old bed of the Rio Grande del Norte as that river ran in 1852, from the point where the south boundary line of the allotment of Jose Maria Garcia above mentioned, or its eastern prolongation intersects the said center of the old bed of the Rio Grande del Norte, in a northerly direction to the intersection of the north boundary of the allotment to Jose de la Luz Jaquez or its eastern prolongation with the said center of the old river bed.

I afterwards sent for Longino Borunda, who lives in San Miguel, Dona Ana County, N. M. (who with Sostenos Rios are the only survivors of the original allottees of the Refugio Colony Grant), and asked him to point out to me the old bed of the Rio Grande del Norte as that river ran in 1852. He went with Sostenos Rios and myself over the whole length of the said river bed from the north boundary of the allotment of Jose de la Luz Jaquez to the south boundary of the allotment of Jesus Maria Garcia, and

pointed out the line which had already been surveyed by me as the old bed of the river in 1852.

71 On this occasion I took the testimony of Sostenos Rios and Longino Borunda, the only surviving original allottees of the grant, and of Jesus Enriques, the son of Simon Enriques, also one of the original allottees, whose affidavits are herewith submitted, marked respectively Exhibits "D," "E," and "F," and I questioned other old residents of the vicinity, but none could give me any positive information in relation to the location of the Rio Grande, in 1852, nor as to the lines of the original allotments of the Refugio Colony Grant.

I again went upon the ground in March, 1902, and with the same assistants surveyed a line along the center of the old bed of the Rio Grande del Norte as it was located in 1852, from the point where the said line is intersected by the north boundary of the land allotted to Jose de la Luz Jaquez or its prolongation east, in a northerly direction to a sufficient distance to include a square league of land between said north boundary on the south, and east and west line parallel thereto on the north, the center of the old bed of the Rio Grande as it was located in 1852 on the east and the hills west of the said river on the west.

On the occasion of my last visit to the locality one Jesus Ochoa, who lives in that vicinity and who is one of the commissioners of the Grant, complained that I had located the old river bed too far west, and brought several witnesses to prove the fact. I refused to take their testimony without first taking them on the ground, that they might point out to me the locus of the old river bed in 1852; and taking them upon the ground they pointed out the line

72 I had already surveyed as the location of the Rio Grande del Norte in 1852.

I submit herewith their affidavits marked respectively Exhibits "G," "H" and "I."

I have the honor to submit also herewith two plats marked respectively Exhibits "C" and "K," upon which I have given the courses and distances along the center of the old bed of the Rio Grande del Norte as that river ran in 1852, beginning at a point where said line is intersected by the south boundary of the allotment made to Jesus Maria Garcia or its prolongation east.

On the occasion of my first visit I attempted to locate the 32 parallel of latitude, the boundary line between Texas and New Mexico, from a post which had been placed on the line of the A. T. & S. F. railroad to mark the boundary line of its intersection with the present bed of the Rio Grande del Norte. This line is shown on the plat marked Exhibit "C," as are also the location of the Los Amoles, the first settlement on the grant. The railroad station at Anthony, and the residence of Jesus Ochoa, who endeavored to make it appear that all of the land in the vicinity (which he claims under the grant title, and a part of which he had sold) is within the Grant.

On the occasion of my last visit I found and identified one of the original Monuments placed on the line of the 32nd parallel of latitude in 1861 by John H. Clark, Commissioner, etc., Texas boundary

Survey, about five or six miles east of the railroad, and I found that an east and west line through this monument crosses the railroad at a point about 400 feet north of the post above referred to.

73 I therefore recommended that the east boundary of the Refugio Colony Grant be located along the line of the old bed of the Rio Grande del Norte as indicated by courses and distances upon the plats submitted, marked respectively Exhibits "C" and "K."

Respectfully submitted,

CLAYTON G. COLEMAN,
Commissioner C. P. L. C.

Endorsement: F. 9. In the Court of Private Land Claims. The Grant of the Colony of Refugio et al. vs. United States. Nos. 150 & 193. Refugio Colony Grant. Report of Clayton G. Coleman, Commissioner, C. P. L. C. Filed in the office of the Clerk, Court Private Land Claims, March 31st, 1902. James H. Reeder, Clerk. By Ireneo L. Chavez, Deputy.

EXHIBIT "G."

In the Court of Private Land Claims, Santa Fe District.

Nos. 150 and 193.

THE GRANT OF THE COLONY OF REFUGIO et al.
vs.
UNITED STATES.

Refugio Colony Grant.

This cause coming on this day to be heard upon the report of Clayton K. Coleman, heretofore appointed a Commissioner of this court for the purpose of ascertaining and reporting to the court the location by metes and bounds of the east boundary of said grant, the same being the middle or thread of the Rio Grande del Norte as the same existed in 1852, and it appearing to the court that the

74 said Clayton G. Coleman has duly filed his report herein as required by the order of the court for his appointment, and that no objections or exceptions have been filed thereto by any of the parties at interest, it is accordingly on motion of Matt. G. Reynolds, United States Attorney, ordered that said report of the said Clayton G. Coleman be, and the same hereby is, approved, in all its parts.

It is further ordered and adjudged that the middle or thread of the Rio Grande del Norte as the same existed in 1852 is declared to be located upon the courses and distances as set forth in the said report of said Clayton G. Coleman filed with the clerk of this court, together with the maps accompanying the same: and that said old river bed as so located constitutes and is the proper east boundary of said grant, said location by courses and distances being as follows, to-wit:

Beginning at the southeast corner of the grant as located by said Clayton G. Coleman, the *said* being the point where the south

boundary of the lands allotted to Jose Maria Garcia in 1852 intersects the center of said old river, and running thence northerly along the center of said old river bed, as follows:

N. 12 deg. 26′ E., 9.41 chains, to station 2; thence N. 6 deg. 34′ E. 7.95 chains to station 3; thence N. 40 deg. 34′ E. 23.76 chains, to station 4; thence N. 72 deg. 58′ E. 12.74 chains to station 5; thence N. 31 deg. 46′ E. 4.50 chains to station 6; thence N. 39 deg. 51′ E. 11.38 chains to station 7; thence N. 70 deg. 07′ E. 10.34 chains to station 8; thence N. 49 deg. 57′ E. 8.39 chains to station 9;
75 thence N. 24 deg. 41′ E. 8.73 chains to station 10; thence N. 33 deg. 06′ E. 7.95 chains to station 11; thence N. 17 deg. 45′ E. 7.89 chains to station 12; thence N. 0 deg. 23′ W. 8.67 chains to station 13; thence N. 48 deg. 30′ W. 11.38 chains to station 14; thence N. 70 deg. 44′ W. 7.92 chains to station 15; thence N. 85 deg. W. 11.30 chains to station 16; thence S. 31 deg. 45′ W. 11.79 chains to station 17; thence S. 16 deg. 10′ W. 10.38 chains to station 18; thence S. 83 deg. 50′ W. 10.82 chains to station 19; thence S. 88 deg. 37′ W. 14.21 chains to station 20; thence N. 57 deg. 71′ W. 19.36 chains to station 21; thence N. 56 deg. 08′ W. 9.97 chains to station 22; thence S. 80 deg. 51′ W. 18.50 chains to station 23; thence N. 45 deg. 14′ W. 14.94 chains to station 24; thence N. 27 deg. 12′ W. 17.68 chains to station 25; thence N. 20 deg. W. 11.91 chains to station 26; thence N. 17 deg. 40′ E. 15.23 chains to station 27; thence N. 53 deg. 08′ E. 13.94 chains to station 28; thence N. 46 deg. 04′ E. 17.11 chains to station 29; thence N. 45 deg. 52′ E. 14.21 chains to station 30; thence N. 26 deg. 11′ E. 9.71 chains to station 31; thence N. 55 deg. 17′ E. 11.01 chains to station 32; thence N. 49 deg. 32′ E. 12.98 chains to station 33; thence N. 38 deg. 30′ E. 5.73 chains to station 34; thence N. 48 deg. 58′ E. 4.21 chains to station 35; thence N. 79 deg. 50′ E. 5.74 chains to station 36; thence S. 40 deg. 10′ E. 8.95 chains to station 37; thence S. 82 deg. 20′ E. 7.77 chains to station 38; thence N. 55 deg. 16.59 chains to station 39; thence N. 10 deg. 30′ E. 9.91 chains to station 40; thence N. 0 deg. 37′ E. 13.30 chains to station 41; thence N. 33 deg. 39′ E. 15.41 chains to
76 station 42; thence N. 7 deg. 30′ W. 9.36 chains to station 43; thence N. 39 deg. 13′ W. 10.40 chains to station 44; thence N. 28 deg. 14′ W. 12.82 chains to station 45; thence N. 25 deg. 02′ W. 13.47 chains to station 46; thence N. 34 deg. 30′ W. 13.83 chains to station 47; thence N. 69 deg. 30′ W. 10.61 chains to station 48; thence N. 69 deg. 50′ W. 7.33 chains to station 49; thence N. 63 deg. 35′ W. 10.28 chains to station 50; thence N. 51 deg. 30′ W. 9.04 chains to station 51; thence N. 48 deg. W. 7.91 chains to station 52; thence N. 27 deg. W. 6.20 chains to station 53; thence N. 24 deg. 50′ W. 4.77 chains to station 54; thence N. 22 deg. 33′ W. 4.10 chains to station 55; thence N. 31 deg. 10′ W. 4.58 chains to station 56; thence N. 43 deg. 59′ W. 4.26 chains to station 57; thence N. 44 deg. 13′ W. 4.49 chains to station 58; thence N. 53 deg. 51′ W. 4.23 chains to station 59; thence N. 18 deg. 20′ W. 8.01 chains to station 60; thence N. 16 deg. 38′ W. 7.90 chains to station 61; thence N. 19 deg. 15′ W. 12.52 chains to station 62; thence N. 0 deg. 34′ W. 13.00 chains to station 63; thence N. 23 deg. 10′ E. 14.03 chains to station

64; thence N. 26 deg. 10′ E. 8.34 chains to station 65; thence N. 9 deg. 30′ E. 8.03 chains to station 66; thence N. 23 deg. 37′ E. 5.73 chains to station 67; thence N. 10 deg. 25′ E. 4.89 chains to station 68; thence N. 22 deg. 12′ E. 5.79 chains to station 69; thence N. 1 deg. 24′ E. 5.80 chains to station 70; thence N. 39 deg. 11′ W. 13.31 chains to station 71; thence N. 52 deg. 14′ W. 7.65 chains to station 72; thence S. 76 deg. 25′ W. 17.03 chains to station 73; thence S. 67 deg. 15′ W. 14.67 chains to station 74; thence N. 44 deg. 25′
77 W. 14.18 chains to station 75; thence N. 11 deg. 08′ W. 22.10 chains to station 76; thence N. 6 deg. 30′ W. 10.63 chains to station 77; thence N. 35 deg. 30′ W. 4.63 chains to the northeast corner of said grant as located by said Clayton G. Coleman.

It is further ordered, adjudged and decreed that said shall be surveyed with the boundaries as set forth in the decree of this court made and entered on July 13, 1901, as modified and defined by this decree.

(Signed) JOSEPH R. REED,
Chief Justice.

UNITED STATES OF AMERICA,
District of New Mexico:

I, the undersigned, Clerk of the United States Court of Private Land Claims, do hereby certify that the above and foregoing is a full, true and correct copy of the original decree of confirmation in the above entitled cause *and* the same remains of record in my office, which said decree of confirmation has become final.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at Santa Fe, New Mexico, this 20th day of August, A. D. 1902.

JAMES H. REEDER,
Clerk C. P. L. C.
By IRENO CHAVEZ, *Deputy.*

Endorsement: Refugio Colony Grant. Degree of confirmation of the Court of Private Land Claims. July Term, 1901. Office of U. S. Surveyor General, Santa Fe, New Mexico. Filed Sept. 19, 1902. M. O. Llewellyn, Surveyor General, C. H. E.

78 EXHIBIT "H."

In the Court of Private Land Claims, New Mexico District.

Nos. 150 and 193.

THE CORPORATION OF THE COLONY OF REFUGIO
vs.
UNITED STATES.

Refugio Colony Grant.

Now, at this day, the parties hereto having appeared before the Court by Judge A. B. Fall, Attorney for plaintiff, and Matt. G. Rey-

nols, Attorney for the United States, and having presented an agreement and stipulation requesting this court to amend the original decree of confirmation, entered by this court on July 13, 1901, by striking out of the same the following paragraph, viz.:

"In the event that the old river bed mentioned as the east boundary of said two tracts shall be found at any point to lie within the State of Texas, then the east boundary of this grant shall, to that extent, be the west boundary of Texas instead of said old river."

It is now here ordered, adjudged, and decreed that the original decree of confirmation entered by this court on July 13, 1901, be and the same is hereby amended by striking out of the same the following paragraph, viz.:

"In the event that the old river bed mentioned as the east boundary of said two tracts shall be found at any point to lie within the State of Texas, then the east boundary of this grant shall, to that extent, be the west boundary of Texas instead of said old river."

And it is ordered that said original decree of July 13, 1901, as amended by the supplemental decree entered by this court on May 22, 1902, shall in all other respects remain as certified to the Commissioner of the General Land Office by the Clerk of this
79 court on August 20, 1902. And the Clerk of this court is directed to mail to the commissioner of the General Land Office at once, a certified copy of this order.

(Signed) JOSEPH R. REED,
Chief Justice C. P. L. C.

Santa Fe, New Mexico, March 19th, 1903.

Endorsement on back: Publication Notice, in English and Spanish of Refugio Colony Grant Survey. Published in "Rio Grande Republican." First publication made February 12, 1904.

Exhibit "I."

U. S. Surveyor General's Office, Santa Fe, New Mexico, February 12, 1904. Notice is hereby given under Act of Congress approved March 3, 1891, and amendments thereto, that in pursuance of a decree made on July 13, 1901, amended order certified on August 20th, 1902, and amended order dated March 19, 1913, all of which were made by the U. S. Court of Private Land Claims, confirming Tract No. 1 of the Refugio Colony Grant to the corporation of Refugio in trust for the persons to whom the same was allotted and such other persons as were bona fide residents upon the same at the date of the Treaty of Dec. 30, 1853, between the United States and Mexico, known as the Gadsden purchase, and to the heirs and successors in interest of such persons and Tract No. 2 of said grant to the corporation of Refugio absolutely, both tracts of said grant being situated in Dona Ana County, New Mexico. The survey of
80 said Refugio Colony Grant, Tracts Nos. 1 and 2 have been made by Wendell V. Hall, U. S. Deputy Surveyor, under contract No. 362 dated November 5, 1902; was returned

to this office on December 31, 1903, and the plat and survey thereof is complete in this office ready for public inspection. Said grant has been surveyed in conformity with the boundary calls set forth in the decrees and orders of the court hereinbefore referred to, and Tract No. 1 embraces an area of 3450.38 acres. The survey of said grant or claim will be retained in the U. S. Surveyor General's Office at Santa Fe, New Mexico, for the full period of 90 days, exclusive of the first day of publication of this notice, and any party claiming an interest in the confirmation, or any interest in the tracts embraced in said survey, or any part thereof, desiring to make objections to said survey and plat is required to state distinctly in writing the interest of the objector together with such affidavits or other proofs as he, she or they may desire to produce in support of the objections, and file the same in this office within said period of 90 days.

MORGAN O. LLEWELLYN,
U. S. Surveyor General for the District of New Mexico.

(First publication made February 12, 1904.)

Endorsed on back: Office of U. S. Surveyor General, District of New Mexico, Santa Fe, New Mexico, May 13, 1904. Report of U. S. Surveyor Gen'l of New Mexico, on official survey of the Refugio Colony Grant, Rep. No. 90 P. L. C. Docket No. 150, situate in Dona Ana Co., N. M., as executed by Wendell V. Hall, D. S., under cont. No. 362, dated Nov. 5, 1902.

81 *Report of the U. S. Surveyor General for the District of New Mexico upon the Official Survey of the Refugio Colony Grant. (Reported No. 90; P. L. C. Docket No. 150.)*

Department of the Interior.

U. S. Surveyor General's Office for the District of New Mexico.

SANTA FE, NEW MEXICO, May, 13, 1914.

The Commissioner General Land Office, Washington, D. C.

SIR: The official survey of the Refugio Colony Grant, Reported No. 90; P. L. C. Docket No. 150, situate in Dona Ana County, New Mexico, has been made by Wendell V. Hall, D. S. under contract No. 362, dated November 5, 1902, and I herewith submit my report thereon as provided by Section 10 of the Act of Congress approved March 3, 1891.

Under authority of letter "E" (J. S. W.) dated October 28, 1902, contract No. 362, dated November 5, 1902, was entered into with Wendell V. Hall, U. S. Deputy Surveyor, for the execution of the survey in the field, and it has been reported by the deputy in his official field notes as having been made from December 23 to 30,

1903, inclusive. His official field notes were filed in this office on Dec. 31, 1903.

Special examiner William J. Lightfoot made a field examination of this survey during March, 1904, and his official report of such examination was filed in this office on April 4, 1904. The examiner states that the contractor has used more than ordinary care
82 in making this survey; the corners are well made and the many marks required are plainly cut in the rock. He recommends that the survey be accepted.

Due notice by publication in both the English and Spanish languages, as provided by the Act of Congress approved March 3, 1891, and amended June 6, 1900, was ordered by office letter dated February 11, 1904, and publication once a week for four consecutive weeks was made in the Rio Grande Republican, published weekly at Las Cruces, New Mexico, (a newspaper published nearest the grant survey), notifying any and all persons claiming any interest in the tract embraced in said survey, or any part thereof, that they would be required to file in the surveyor general's office their objections, in writing, setting forth the interest of the objector and the grounds of the objections, with such affidavits and other proofs as they might desire to produce in support thereof, within the period of 90 days from the date of the first publication of said notice.

The survey and plat of said Refugio Colony Grant were retained in this office for public inspection for the full period of 90 days expiring with May 12, 1904, in accordance with the provisions of said law.

Within said period of 90 days Bonham, Holt & Mann, Attorneys for the Commissioners of the Refugio Colony Grant, on May 12, 1904, filed in this office objections to said survey and plat, a true copy of said objections being hereto attached, marked exhibit "A," and submitted for the consideration and action of the Court of Private Land Claims. No other objections have been filed in this office by parties in interest to this survey.

83 The Act of Congress approved March 3, 1891, implies that the surveyor-general should not approve the survey and plat when objections thereto have been filed in this office during the period of publication and retention of them for 90 days in this office for public inspection, and for such reasons I have not placed my approval upon them, but it is my opinion that the survey has been made as nearly in conformity with the decree of the Court and the contract with this office as possible, by the deputy, and I recommend its acceptance and approval by the Court of Private Land Claims, and if accepted and approved, request that the plat and transcript be returned to the surveyor-general of New Mexico, for his approval to be placed thereon.

I therefore transmit a true copy of the official field notes and one plat, and request that the same be submitted to the Court of Private Land Claims for its consideration, and action.

The special Examiner's report on his examination of the survey of this grant is included in his report of the examination of the

Santa Teresa Grant, which was transmitted with letter of even date herewith in connection with said Santa Teresa Grant survey.

Very respectfully,

MORGAN O. LLEWELLYN,
U. S. Surveyor-General for the District of New Mexico.

Copy.

84 EXHIBIT "A."

In the Court of Private Land Claims, Santa Fe, New Mexico.

THE GRANT OF THE COLONY OF REFUGIO et al.
versus
THE UNITED STATES.

Come now the commissioners of the Colony of Refugio, by Bo*h*am, Holt & Mann, their attorneys, and respectfully protest against the official survey of said grant as made by Wendell V. Hall, in December, 1903, and as grounds of said protest, say: that the said survey was carelessly and inaccurately made; that same was not and is not properly monumented upon the ground; that the same was not and is not monumented in accordance with the official field notes of said survey; that certain monuments originally placed to mark said survey were moved, without an instrument, under instructions from said Hall, after he had completed said survey and returned to Santa Fe, New Mexico; that the eastern boundary line did not and does not follow the bed of the Rio Grande as said river followed in 1852, as established by Clayton G. Coleman, under orders of this Honorable Court, was incorrect; that the boundary line between tracts 1 and 2 of said grant, as per said official survey, was and is located 11.37 chains south of where it should be; that there is a discrepancy on the north and south lines of tract No. 2 of said grant between the said lines, as marked upon the ground, and as called for in said official field notes; that the western boundary of said tract No. 2 does not follow or conform to the foot f the slpe or drainage of the foothills, but for most of the distance along said
85 boundary is well up on said slopes; that the head or intake of Los Amoles acequia is not and never was three hundred yards south of the north boundary of the lands of Jose de la Luz Jaquez; that the decree of this Court, limiting said tract No. 2 to one square league, was erroneous, and that the north boundary line of said grant should be established about three hundred yards north of the head or intake of said Los Amoles acequia, as indicated upon the plat marked Exhibit "A" hereinafter referred to; that the area of said tract No. 2, as per said official survey, does not embrace one square league of land.

And protestants further show to the court, that the Rio Grande River bed in 1852 was as indicated and delineated in black lines upon a blue print hereto attached, marke*t* Exhibit "A" and forming a part hereof; and that the true southeast corner of said grant was

and is as indicated on said plat at the point marked "Sta. 1"; that the allegations hereinabove set forth are supported by the affidavit of Charles L. Post, Surveyor, attached to said blue print Exhibit "A," and by the affidavits of William S. King, Arthur E. Story, Anacacio Duran, Catarino Martinez, Regino Quintana and Victoriano Avalos, which are attached hereto and made part hereof.

Wherefore, protestants pray, that the said survey of said grant be not approved and that this Honorable Court direct a resurvey thereof; in accordance with the showing herein and hereby made.

COMMISSIONERS OF THE REFUGIO COLONY GRANT,
By BONHAM, HOLT & MANN,
Las Cruces, New Mexico,
Their Attorneys.

86 Carbon copy of foregoing answer received this 13th day of February, 1913.

SEYMOUR THURMOND,
Attorney for Plaintiffs.

And thereafter, on to-wit, the 7th day of May, A. D. 1914, there was filed in the office of the Clerk of said Court in said cause, plaintiff's reply, which said reply is in words and figures as follows, to-wit:

Reply.

Now comes the plaintiff in the above styled and numbered cause and replying to the amended answer, filed herein by the defendants, alleges:

First. In reply to the matters set out in Paragraph 2 of Defendants' amended answer, they say that each and all of the said promissory notes, described in and set out in plaintiff's original complaint filed herein on the 13th day of December, 1912, were executed by the makers, defendants herein, in part payment of the purchase price for certain lands and other property sold and conveyed by plaintiffs' assignor and endorser, the said W. H. Reinhart, to plaintiff, of said notes, which lands are described in plaintiff's original complaint, and are located in Dona Ana County, New Mexico, and not in the State of Texas.

Second. That the lands conveyed by the said W. H. Reinhart were at the time of their conveyance by said Reinhart to defendant D. B. Smith, owned and possessed by said Reinhart, and the said Reinhart was then and had been prior thereto, the owner of certain good, valid, lawful valuable and indefeasible rights and interests in said lands, the said Reinhart being then in personal, exclusive, actual and lawful possession of the same, and claiming the same in good faith under deeds and mesne conveyances, and
87 under color of title theretofore acquired in good faith and for value by said W. H. Reinhart, and plaintiffs say that said lands were acquired for value by said Reinhart from Allen Potter, by whom said lands were conveyed to said Reinhart by deed

dated January the 25th, 1909; the lands described in and conveyed by said deed being, as alleged by defendants, in their amended answer, filed herein, the same lands as those described in plaintiff's original complaint filed herein.

That said lands were acquired by said Allen Potter by purchase and for value, in good faith from one (1) H. M. Maple and wife, by whom said lands were conveyed to said Potter by deed dated January 9th, 1908.

That said lands were for value and in good faith acquired by purchase by said H. M. Maple from Canuto Alvarez, Dionicio Alvarez, Simon Alvarez, Jose Alvarez, Josefa A. Ochoa, Luaro C. Alvarez, Maximo Alvarez and Felicitas Alvarez, who jointly conveyed the same to said H. M. Maple by deed dated January 17th, 1908; and to the grantors in said last mentioned deed from Canuto Alvarez and others to H. M. Maple; said land was conveyed by Felicitas Alvarez by deed dated May 11th, 1904, and to said Felicitas Alvarez the same were conveyed by Leon Alvarez by deed dated December 15th, 1898; and to said Leon Alvarez, said lands were conveyed by the following named persons by deeds of the respective dates hereinafter shown, that is to say: deed from Cleto Roibal and wife, dated February 8th, 1892; deed from Guadalupe Carrasco and wife, dated December 7th, 1895; deed from Braulio Ortega and wife, dated December 20th, 1892; deed from Tranquilo
88 Fierro and wife dated August 15th, 1892; deed from Nicolas Sisneros, dated February 8th, 1892; deed from Martin Lemos and wife dated February 8th, 1892; and from Luis F. Acosta and wife, dated February 15th, 1895; deed from Francisco Borunda and wife, dated September 5th, 1892, to whom, that is to say, to the aforesaid Grantors who conveyed respectively to Leon Alvarez, the several tracts of land by them respectively conveyed, were conveyed by deeds from the Commissioners of the Colony of Refugio, as follows: Cleto Roibal, dated December 15th, 1888; to Guadalupe Carrasco, dated November 24th, 1888; to Tranquilo Fierro, dated November 23rd, 1888; to Nicolas Sisneros dated November 24th, 1888; to Martin Lemos dated December 15th, 1888; to Luis F. Acosta dated December 4th, 1894; to Francisco Borunda, dated December or November 23rd, 1888.

That a portion, two (2) tracts or parcels of said lands, conveyed as aforesaid by H. M. Maple and wife to Allen Potter and by said Allen Potter to W. H. Reinhart were conveyed to said Maple by Gabriel Lopez and wife, by deed dated January 4th, 1908, one of which said tracts was conveyed to Gabriel Lopez by Christobal Lagarda, Fabian Fierro and Carmen L. Fierro, by deed dated November 11th, 1907; and to Gabriel Lagarda the land conveyed by him and others to said Gabriel Lopez, the same was conveyed by the Commissioners of the Refugio Colony or Colony of Refugio by deed dated December 18th, 1888; and one of the said tracts so conveyed, as aforesaid, by said Gabriel Lopez to said H. M. Maple, was conveyed to said Gabriel Lopez by the Commissioners of said Colony of Refugio or Refugio Colony by deed dated December 15th, 1888;

and plaintiff says that each and all of said deeds constituted
89 a valid claim and color of title to said lands; and that under the same, the respective grantees acquired, and thereafter until the same had been by them respectively conveyed by deed to their respective grantees, as above stated, asserted claim to said lands, hereinbefore described, which deeds constitute his claim and color of title thereto.

That long prior to and at the date of the deed from Allen Potter to W. H. Reinhart, the said Potter had and held actual and peaceable possession of said lands, holding and claiming the same in good faith and under said several deeds, hereinbefore described, which deeds constitute legal claim and color of title thereto.

That under the several conveyances and deeds mentioned aforesaid, Potter's predecessors in title and claim to said lands had asserted claim and color of title thereto, and possessed, occupied and enjoyed said lands and the respective parcels thereof by them subsequently conveyed; that said tract of land, as a whole, was for many years and is now commonly called Rancho del Gato; that said Allen Potter at the time he purchased said lands of H. M. Maple and wife, made said purchase in good faith and for value, believing that he was, and plaintiff now says he was, acquiring a good and valid claim and title thereto; that prior to the consummation of the purchase thereof, he sought and obtained the services of a reputable attorney at law, whom he had good reason to believe and did believe and whom he says was fully qualified and capable of advising and counseling him in respect to the validity of the title to said lands for which he was then negotiating with said Maple, who
90 claimed and represented to said Potter that he was the owner thereof and had title thereto, and was asserting title and claim thereto under the deeds and conveyances hereinbefore mentioned, whereby said lands were conveyed to said Maple; that an abstract of title purporting to show the several deeds, conveyances and muniments of title under which said Maple asserted claim of title to said lands (said abstract of title having been prepared by the Southwestern Abstract and Title Company of Las Cruces, New Mexico) was delivered by said Maple to said Potter and by said Potter to his Attorney, to wit: H. B. Holt, a regularly licensed attorney at law and a resident of Dona Ana County, New Mexico, in which said lands are situated; that said attorney at law was regularly employed and by said Potter requested to make a full and complete investigation of the validity of the claim and title of said Maple to said lands; and to advise said Potter, who was not an attorney, and was wholly unfamiliar with questions of validity or invalidity, legality or illegality of land titles, whether or not said Maple held and could convey to him, said Potter, a good and valid claim and title to said land; that said attorney, H. B. Holt, thereafter, after duly examining said Maple's title and claim, as shown by said abstract of title, reported in writing to said Potter in substance that said Maple's claim and title to said lands constituted a good and valid title thereto; and that said Maple could, in the opinion of said attorney, make and convey to said Potter a good title to said land;

that at the time of conveying of said land by W. H. Reinhart to defendant D. B. Smith, said abstract of title and said letter of said attorney, both of which had theretofore been delivered by
91 the said Potter, in whose possession same were, to said Reinhart and were by said Reinhart delivered and are now in the possession of said defendant D. B. Smith, who is hereby notified to produce the same upon the trial of this cause, in order that the same may be offered in evidence in support of plaintiff's claim of title acquired in good faith; and plaintiffs state that they are unable to state other than the substance of said report and said letter of said attorney, for the reason that the same are in possession of said D. B. Smith, to whom same were delivered at the time of the delivery of deed, whereby said Reinhart conveyed said lands to said Smith; that plaintiffs had knowledge of said opinion before given by said attorney and relied in part on same, in purchasing the notes and mortgage, aforesaid.

That said Allen Potter, believing and relying upon the advice so given, by his said attorney at law, after he had been advised as aforesaid by said attorney, purchased said land from said Maple, paying value therefor.

That immediately thereafter said Potter, in good faith, believing that he had acquired a good and valid claim and right to said land, and to enter upon and into possession thereof, did enter thereon and into possession thereof, and erected substantial and permanent improvements thereon, consisting of houses, fences, irrigation ditches and other improvements, and expended large sums of money in acquiring water rights and community ditch rights, whereby he might secure water for the purpose of cultivating said lands, which water and a community ditch rights were by said Potter
92 thereafter, at the time he conveyed the said land to said Reinhart, conveyed with the land, to said Reinhart, and by him in turn, conveyed to defendant D. B. Smith, and are now held and enjoyed by said D. B. Smith or those holding and claiming said lands under said D. B. Smith; and said Potter expended other large sums of money in removing timber and forest growth from said lands, in leveling same and placing the same in cultivation and in seeding and planting thereon, valuable and permanent crops, such as alfalfa, to the growth of which a large part of the land was appropriated and used by said Potter and by said Reinhart, prior to and at the time of conveyance and delivery of possession of said premises, together with the improvements and growing crops thereon, to defendant D. B. Smith, and which said premises have been since the delivery of possession of said Smith, been by him and those claiming under him, have been used and appropriated to the growth of such crops, and to agricultural purposes.

Plaintiff says that prior to and at the time said premises were conveyed to said Reinhart by Allen Potter, that said Reinhart was then familiar with former negotiations and the purchase of said Potter of said lands from H. M. Maple, and was aware that prior to his purchase, said Potter had been furnished with an abstract of the title of said lands as hereinbefore alleged; and that he had employed a

trustworthy and experienced attorney to examine the title and to advise him, Potter, in respect to such purchase; and that relying upon the advice and counsel of such attorney, Potter concluded the purchase thereof; and that said Reinhart, having good reason to believe, and believing at the time the said lands were con-
93 veyed to him, knowing that said Potter was then in the actual use and possession and enjoyment thereof, cultivating and using the same, that said Potter had a good and valid title and claim thereto, and that by his conveyance said Reinhart would acquire a like good title and claim thereto, he Reinhart in good faith, accepted the deed of said Potter conveying said lands and property thereon; and thereafter in like good faith, conveyed the same to defendant D. B. Smith.

Wherefore plaintiff says that at the time the said lands were by said Reinhart conveyed to said D. B. Smith, he Reinhart did then have claim and color of title thereto acquired in good faith. And plaintiff denies that the assertion by said Reinhart of the right to the use and occupancy of said lands in the premises and under his said claim and color of title acquired and asserted in good faith was unlawful or in violation of any law or act of the Congress of the United States of America, or of the Territory of New Mexico, and especially denies that such assertion was in violation of the Act of Congress of February 25th, 1885.

Plaintiff denies that said lands were at the time Reinhart conveyed to defendant D. B. Smith public lands of the United States of America, and says that if in fact said lands were then public domain, nevertheless the said Reinhart then had and asserted good claim and color of title which was acquired in good faith thereto, and was then claiming the same under deeds, conveyances and a chain of title, dating back more than twenty (20) years prior to the date of the deed of defendant Smith, and sufficient in law to constitute a
94 good, valid and legal claim and color of title thereto acquired and asserted in good faith and the sale and conveyance of which to defendant Smith was good and valid in law, and constitutes a good and valid consideration for the execution and the delivery of the promissory notes sued on.

Third. Plaintiffs replying to defendants' plea of estoppel as set forth in Paragraph IV of the amended answer denies that W. H. Reinhart from whom plaintiff acquired the notes sued on, or either or any of the several grantors and predecessors in title or claim of said Reinhart were ever parties either as plaintiff or defendant to any suit or action before the Court of Private Land Claims or of any other court wherein their title, color of title, or claim, acquired in good faith or otherwise to the said lands was the subject matter or in issue or subject of inquiry or investigation by such court; and plaintiff denies that any such suit or action was ever brought, instituted or defended for or on account of said Reinhart or either or any of his predecessors in title by any person or persons or by any corporation, and particularly by any corporation known as Grant of Refugio Colony or by Wm. Dessauer, previously or any time authorized to institute, prosecute or defend any such suit.

Plaintiffs further say and show to the Court that if any such suit as is alleged by defendant, was ever at any time instituted before said Court of Private Land Claims, that the complainants in said suit at the time of the institution thereof, had neither title, claim or color of title to the lands described in plaintiff's original petition herein; and if said complainants or either of them had ever had or asserted or claimed title thereto they had long prior to the institution of said suit, sold, conveyed and parted with such claim
95 or title and were no longer possessed of any further interest therein.

Wherefore plaintiffs say that neither said Reinhart or any of his predecessors in title were or are bound by any decree in said or by said Court of Private Land Claims, nor are they or either of them in any wise estopped thereby.

And plaintiffs deny defendants' allegations that the execution of the promissory note sued on by plaintiff's Bank was obtained by W. H. Reinhart, payee, by virtue of and through unlawful assertion of a right to the exclusive use and occupancy of the lands therein described.

Plaintiffs further say that the lands described in their complaint were allotted by the corporation of the Colony of Refugio, long prior to the alleged adjudication of said Court as to the alleged boundary of said Refugio Colony Grant, and all of said lands were at that time and long prior thereto had been held in severalty by the plaintiffs' grantors; and that neither said corporation nor said Wm. Dessauer, or any other party to said suit had at that time, any interest whatsoever in said lands described in plaintiffs' complaint; and that said alleged adjudication is in no way binding upon the plaintiffs or their grantors.

Plaintiffs further say that they have no knowledge or information as to whether or not the exhibits attached to plaintiffs' petition are true copies thereof of the order, decree, etc., that they purport to be, and therefore deny them and demand strict proof of same.

Plaintiffs deny that prior to the execution and delivery of said notes that said Reinhart was indebted to complainant's Bank
96 in large sums of money; or that said Reinhart agreed prior to said sale, to turn over to said Bank, said notes in payment of or in security for indebtedness to said Bank.

And plaintiffs further deny that the lands described in their complaint were adjudged by the Court of Private Land Claims to be public lands of the United States, or that they were so adjudged by any other Court whatsoever; and they further state that since the survey of Said Refugio Colony Grant by said Elkins and Marmion, as alleged by defendants, and the approval of said Survey so made of said Grant by the United States Surveyor General of New Mexico, that the lands described in plaintiffs' petition have at all times been designated by official maps on file in the United States Land Office, as being part of the Refugio Grant; and that the United States has never made adverse claim thereto or to any part thereof, but has at all times recognized the title of plaintiffs and their grantors thereto.

Wherefore, plaintiffs pray as in their original complaint.

W. H. WINTER,
El Paso, Texas;
J. H. PAXTON,
Las Cruces, New Mexico;
R. L. YOUNG,
Las Cruces, New Mexico;
SEYMOUR THURMOND,
El Paso, Texas,
Attorneys for Plaintiff Third National Exchange Bank and F. P. Zollinger.

Verified in the usual form by Seymour Thurmond, on the 4th day of March, A. D. 1913.

97 And thereafter, on to-wit, the 31st day of July, A. D. 1913, there was filed in the office of said Clerk, in said case, the motion by defendants for judgment on the pleadings, which said motion is in words and figures following, to-wit:

Motion by Defendants for Judgment on the Pleadings.

Now comes D. B. Smith and Gertrude Smith, defendants in the above styled and numbered cause, and move the court to render judgment in said cause for defendants, dismissing the complainants' complaint on the merits, on the pleadings of complainants and defendants on file in said cause on the following grounds:

Because the defendants have alleged facts in the amended answer which constitute in law a complete defense to the cause of action pleaded by the complainants in their complaint, as will be more particularly mentioned hereinafter, to which answer complainant filed a special replication, but failed to deny therein the material facts pleaded by the defendants as a defense to the complainants' complaint, in this:

I.

The defendants pleaded new matter by way of defense to said complaint, alleging that the notes sued on and the mortgage sought to be foreclosed were illegal and should not be enforced by this court, in that they were executed in, and as part of, a transaction wherein W. H. Reinhart illegally held possession and as-

98 serted exclusive possession of public domain of the United States in violation of the statutes of the United States and transferred said possession and his pretended title to defendant D. B. Smith, in consideration of the execution by said Smith of the notes and mortgage sued on herein.

That the complainants, while alleging generally in their replication to defendants' plea of illegality, that W. H. Reinhart owned and claimed the same in good faith under color of title, and denying that said land was public land of the United States, the specifications pleaded in support of said general allegations as to the claim

of title under which complainants deraigned their alleged rights, show that said Reinhart and complainants claim under the chain of transfers under which defendants alleged in their answer that complainants claimed.

II.

The defendants alleged that the complainants claimed by, through, and under, parties who were bound by a certain judgment rendered by the United States Court of Private Land Claims in the suit of The Grant of the Colony of Refugio against the United States of America, wherein the boundaries of the said Colony Grant were determined and adjudicated, and whereby the land in controversy in this suit was adjudged not to be a part of said Colony Grant, but public land of the United States; and complainants, though denying the legal conclusion that said land was a part of the public domain of the United States, do not deny that said adjudication was made or that they claim under the persons whom defendants allege to have been parties to said suit, through representa-
99 tion by the said corporation, and who were bound by the said judgment; nor do complainants deny that they and said Reinhart, through whom they claim, had full knowledge of said adjudication. The complainants in their replication plead entirely independently of the allegations of the defendants on this subject, and allege that neither they, nor those under whom they claim, were parties to said suit, whereas, defendants did not allege that complainants or those through whom they claimed were personally parties to the said suit, but defendants alleged the incorporation of the owners of the said grant with authority to sue and be sued with reference to the land claimed as part of said Colony Grant, and that Leon Alvarez, through whom complainants claimed, was a member of said corporation, and that before and at the time said suit was instituted by said corporation against the United States, he held the several tracts of land which composed the tracts sought herein to be foreclosed on, as a member of said corporation, and that the adjudication thereinafter made was binding on said Alvarez and those claiming to have acquired title or claim by, through and under him pending said suit, and since the judgment therein was rendered; and showing that said Reinhart and complainants claim through said Alvarez, with full knowledge of said adjudication, under conveyance made by said Alvarez while said suit was pending, none of which facts are denied by complainants; but they plead that neither they, nor those under whom they claim, were personally parties to said suit and the legal conclusion that they were not bound
100 thereby, and that said judgment was no obstacle to their plea that Reinhart held said land under color of title and in good faith, which raises legal questions only.

III.

The defendants further pleaded in their answer the taking of the several steps, such as surveying and publishing the survey according to the United States statutes, etc., which the statutes provided

should be taken in such suits, after judgment was entered, in order to render the determination of the boundaries of said Colony binding in rem against all persons who did not appear and successfully controvert said boundaries as thus established; and the complainants have not denied that such proceedings were taken as pleaded by the defendants.

Wherefore, defendants say that the public policy of the statute creating said Court of Private Land Claims expressly for the purpose of settling all good faith claims of persons claiming under such Colony Grant, precludes complainants from pleading or maintaining that those under whom they claim held possession of said land in good faith, and leaves complainants without sufficient reply to the defense of illegality of the consideration for the notes and mortgage sued on. That said amended answer is in substance the same as the answer which the Supreme Court of New Mexico sustained on appeal in this case, with the addition of the pleading by defendants of the source of complainants' title, as coming under said judgment, and an estoppel of complainants to plead any holding in good faith, which pleading of the source of complainants' title and
101 said judgment and determination thereof and the estoppel based thereon has been added in the amended answer filed since the former judgment was reversed.

F. G. MORRIS,
Attorney for Defendants.
SAM B. GILLETT,
HOLT & SUTHERLAND,
Attorneys for Defendants.

And Thereafter, on to-wit, the 25th day of August, A. D. 1913, there was filed in the office of the clerk of said court, in said cause, and entered of record therein, an order, which said order is in words and figures following, to-wit:

Order Overruling Motion for and Judgment on the Pleadings.

This cause having come regularly on to be heard on the 18th day of August, A. D. 1913, upon the motion of the defendants for judgment on the pleadings, the defendants appearing by Messrs. F. G. Morris and Holt & Sutherland, their counsel of record, and the plaintiffs appearing by Messrs. Seymour Thurmond, J. H. Paxton and R. L. Young;

And the court having heard argument of counsel, considered said motion and taken the same under advisement, now denies the same.

Wherefore, it is Considered, Ordered and Adjudged by the court that the motion of the defendants for judgment on the pleadings in this cause be, and the same is hereby, overruled and denied.
102 To which ruling and order of the court the defendants except.

Done at Las Cruces, in the Third Judicial District of the State of New Mexico, this 25th day of August, A. D. 1913.

EDWARD L. MEDLER, *Judge.*

And thereafter, on to-wit, the 13th day of June, A. D. 1914, there was filed in the office of the clerk of said court, and entered of record in said cause, an order, which said order is in words and figures following, to-wit:

Order.

This cause coming on this day to be heard pursuant to notice of motion for final judgment heretofore given herein; and the court having heard and considered the motion of defendants for the making of certain findings of fact herein numbered one to eight, inclusive, embodied in and forming a part of said motion, heretofore filed in this cause; and the arguments of counsel having been heard and the court being fully advised in the premises, doth make the findings of fact requested by defendants.

It is therefore considered, ordered, adjudged and decreed by the court here that said findings of fact, as requested by defendants be, and the same are hereby, made and found by the court in this cause.

And now the said defendants by their attorneys, except to the findings of fact embodied in the judgment in this cause to the effect that neither W. H. Reinhart nor any of his predecessors in title or claim were record parties to the judgment referred to in
103 said findings of fact as having been rendered by the United States Court of Private Land Claims fixing and determining the limits and boundaries of the Refugio Colony Grant; they also except to the conclusions of law embodied in said judgment, and to said judgment, as rendered.

And now said defendants giving notice of and praying for an appeal to the Supreme Court of New Mexico, the same is hereby granted.

And now this cause coming on further to be heard upon motion of counsel for defendants for the fixing of the amount of the supersedeas bond herein; and the court having heard the arguments of counsel and being fully advised in the premises doth grant said motion.

It is therefore further considered, ordered, adjudged and decreed by the court here that the amount of the supersedeas bond in this cause be, and the same is hereby, fixed in the sum of five thousand ($5,000.00) dollars.

Done in open court at Las Cruces, New Mexico, this 30th day of April, A. D. 1914.

EDWARD L. MEDLER, *Judge.*

And thereafter, on to-wit, the 13th day of June, A. D. 1914, there was filed in the office of the clerk of said court, in said cause, a findings of fact, which said findings of fact are in words and figures following, to-wit:

104 *Findings of Fact.*

Come now the defendants by their attorneys, and move the court to make the following findings of fact herein, to-wit:

First. That on the 11th day of May, A. D. 1909, defendant D. B. Smith made and delivered to W. H. Reinhart the three promissory notes set up in plaintiffs' complaint, for the aggregate sum of $13,500.00, to bear interest from date at the rate of eight per cent per annum, and with ten per cent on the amount of principal and interest due thereon as attorneys' fees if placed in the hands of an attorney for collection; and that on the 15th day of June, A. D. 1909, before the maturity of any of the said promissory notes, the said W. H. Reinhart, for a valuable consideration, assigned and endorsed all the said promissory notes to plaintiff The Third National Exchange Bank of Sandusky, Ohio; and that the said plaintiff The Third National Bank of Sandusky, Ohio, is now the owner and holder of the said promissory notes; and that the said promissory notes are due; and that no part of the principal, interest or attorneys' fees of the said promissory notes has been paid; and that the said promissory notes were placed after maturity in the hands of an attorney for collection; and that the sum of $1,500.00 is a reasonable fee for such collection.

Given.

E. L. M.

Second. That on the 11th day of May, A. D. 1909, to secure the payment of the said principal, interest and attorneys' fees of the said promissory notes, defendants D. B. Smith and Gertrude
105 W. Smith, his wife, executed, acknowledged and delivered to plaintiff F. P. Zollinger, as trustee, the deed of trust set up in plaintiffs' complaint, for the lands in the said complaint described, providing for the sale of the said lands for the payment of the principal, interest and attorneys' fees of the said promissory notes, and providing for the said trustee a commission and fee of five per cent of the proceeds of any sale under the said deed of trust; and that such commission of five per cent is a reasonable commission and fee for the said trustee; and

Given.

E. L. M.

Third. That the consideration for the said promissory notes and deed of trust was the conveyance by the said W. H. Reinhart to the plaintiff D. B. Smith of the lands in plaintiffs' complaint described; and that the said lands were for many years, before and after the Mexican cession to the United States, in good faith considered to be a part of the Refugio Colony Grant, a Mexican Community Grant, and were so held in good faith by the owners of the said grant; and that the commissioners of the said grant, in good faith, allotted and conveyed the said lands to certain members of the said community

who settled on the said grant; and that the titles and claims of the said allottees thereto were passed and deraigned by a chain of sufficient mesne conveyances to the said W. H. Reinhart; and that the said W. H. Reinhart and his predecessors in title and claim held, occupied and possessed the said lands for more than fifteen years, under and by virtue of the said conveyances from the commissioners of the Refugio Colony Grant and the said mesne
106 conveyances; and that the said defendant D. B. Smith and his assigns now hold and possess, and are cultivating, the said lands under and by virtue of the said conveyances from the commissioners of the Refugio Colony Grant, and the said mesne conveyances, and the said conveyance from the said W. H. Reinhart to defendant D. B. Smith, and subsequent conveyances from defendant D. B. Smith to his said assigns.

Given.

E. L. M.

Fourth. That by the Act of March 7th, 1884, of the Legislative Assembly of New Mexico, the owners of lands within the limits of the Refugio Colony Grant in Dona Ana county, New Mexico, were constituted a body corporate and politic under the name and style of the Grant of the Colony of Refugio, under which they were authorized by said Act to sue and be sued and have perpetual succession; that the owners of lands in said grant thereafter and for many years prior to the bringing of the suit for confirmation of said grant, duly accepted said charter and duly organized and acted thereunder, and have ever since continued so to do; that afterwards, on to-wit, the 28th day of February, 1893, the said corporation and one William Dessauer filed their complaint and suit in the United States Court of Private Land Claims sitting in the city of Santa Fe, New Mexico, in and for said territory, reciting and entitling their suit as suing therein for themselves and in behalf of all others who owned or claimed title to all or any portion of that certain private land grant called, or known as the Grant of the Colony of Refugio, situate in the county of Dona Ana and Territory of New Mexico, against the United States of America, under au-
107 thority of the Act to establish a Court of Private Land Claims, and providing for the settlement of private land claims in certain states and territories, and suing and praying for an inquiry into the validity of said grant, and that the lands embraced within the limits thereof be confirmed unto plaintiffs and other owners of said grant, alleging the limits of said grant to be such as to include therein the said tracts of land described in plaintiffs' mortgage or deed of trust, which is sued on herein; that proceedings were afterwards had in said cause, as pleaded by the defendants in their answer, and resulted in a final judgment, to-wit, 1903, establishing the validity of said grant and determining the boundaries thereof, which boundaries excluded the land involved in this suit as not being a part of said grant; that no appeal was prosecuted from said judgment, and, afterwards, as further pleaded by defendants, the cause proceeded to an official survey of said grant, the publication

notice of such survey and the approval thereof which was had and
e report of same made to the proper authorities, resulting in the
suance of patent to said grant within the limits confirmed by said
dgment, whereby the lands described in the deed of trust herein
ere excluded from the boundaries of said grant as thus determined,
nd there was no other grant of said lands from the United States
r under authority from any other form of government exercising
risdiction over the said territory.
Given.

E. L. M.

Fifth. That at the time said complaint was filed instituting said suit, Leon Alvers, whose name is mentioned as one of the of-
108 ficers of said corporation, owned a claim of title to the lands in controversy which afterwards passed to W. H. Reinhart
nd D. B. Smith.
Given.

E. L. M.

Sixth. That said W. H. Reinhart at the time he sold and conveyed said land to D. B. Smith, knew that said proceedings had been had in said Court of Private Land Claims; and that plaintiffs had failed to sustain the allegation contained in their replication to the effect that H. B. Holt, an attorney at law of Las Cruces, New Mexico, reported in writing to one Allen Potter an opinion in substance to the effect the claim of title of one H. M. Maple to said lands constituted a good title thereto, or that any such opinion was delivered by said Potter to said Reinhart; but the court finds that the said H. B. Holt wrote an opinion as to said title on an abstract submitted to him by said Allen Potter, which opinion was addressed to A. G. Foster, an attorney and abstractor of El Paso, Texas, employed by said Potter, which opinion has been read in evidence on the trial of this cause and forms a part of the record hereof, wherein the said Holt advised in substance, that the land in controversy was public land of the United States, and that plaintiffs, as pleaded in their replication, had knowledge of such opinion and of the facts therein stated and set forth prior to the time when the notes sued on herein were endorsed to the plaintiff bank.
Given.

E. L. M.

Seventh. That at the time the said W. H. Reinhart executed the deed of conveyance to D. B. Smith for which the notes sued on herein were executed, the said Reinhart was in the actual
109 possession by enclosure of said land which he maintained, and was asserting a right to the exclusive use and occupancy thereof without other claim or color of title than that hereinabove stated, and not with a view to entry thereof at the proper land office under the general laws of the United States, which actual possession and enclosure was delivered to the said D. B. Smith as a part of the transaction under which the aforesaid notes and mortgage herein

sued on were executed, in order that he might receive such exclusive possession and enclosure, and that the said D. B. Smith received such exclusive occupancy and claim as a part of said transaction, and thereafter asserted the same in his own behalf.

Given.

E. L. M.

Eighth. And the court further finds to be true those facts pleaded by either party which have not been specifically denied by the opposing party, and also those which have been made the subject of stipulations read into the record upon the trial of this cause and which form a part of such record, and which by reference thereto are made a part of this finding of facts.

Given.

E. L. M.

MORRIS & GILLETT,
El Paso, Texas;
HOLT & SUTHERLAND,
Las Cruces, New Mexico,
Attorneys for Defendants.

And thereafter, on to-wit, the 26th day of June, A. D. 1914, there was filed in the office of the clerk of said court, and entered
110 of record in said cause, a final judgment, which final judgment is in words and figures as follows, to-wit:

Final Judgment.

Now on the 30th day of April, A. D. 1914, the above entitled suit coming regularly on for trial, the said plaintiffs appearing by their attorneys, Seymour Thurmond, R. L. Young, J. H. Paxton and W. H. Winter, and the said defendants appearing by their attorneys, F. G. Morris, S. B. Gillett and Holt & Sutherland, the evidence in behalf of the said plaintiffs and the evidence in behalf of the said defendants having been heard and argument had thereon, and the said evidence and argument having been fully considered by the court;

It is found by the court by way of findings of fact:

1st. That on the 11th day of May, A. D. 1909, defendant D. B. Smith made and delivered to W. H. Reinhart the three promissory notes set up in plaintiffs' complaint, for the aggregate sum of $13,500.00, to bear interest payable annually, from date, at the rate of eight per cent per annum, and interest on accrued and unpaid interest at the same rate, and with ten per cent on the amount of principal and interest due thereon as attorneys' fees if placed in the hands of an attorney for collection; and that on the 15th day of June, A. D. 1909, before the maturity of any of the said promissory notes, the said W. H. Reinhart, for a valuable consideration, assigned and endorsed all the said promissory notes to plaintiff, The Third National Exchange Bank of Sandusky, Ohio; and that the said
111 plaintiff The Third National Exchange Bank of Sandusky, Ohio, is now the owner and holder of the said promissory

notes; and that no part of the principal, interest or attorneys' fees of the said promissory notes has been paid; and that the said promissory notes were placed after maturity in the hands of an attorney for collection; and that the sum of $1,500.00 is a reasonable fee for such collection;

2nd. That on the 11th day of May, A. D. 1909, to secure the payment of the said principal, interest and attorneys' fees of the said promissory notes, defendants D. B. Smith and Gertrude W. Smith, his wife, executed, acknowledged and delivered to plaintiff F. P. Zollinger, as trustee, the deed of trust set up in plaintiffs' complaint, for the lands in the said complaint and hereinafter described, providing for the sale of the said lands for the payment of the principal, interest and attorneys' fees of the said promissory notes, and providing for the said trustee a commission and fee of five per cent of the proceeds of any sale made under the said deed of trust; and that such commission of five per cent is a reasonable commission and fee for the said trustee; and

3rd. That the consideration for the said promissory notes and deed of trust was the conveyance by the said W. H. Reinhart to the defendant D. B. Smith of the lands in plaintiffs' complaint and hereinafter described; and that the said lands were for many years, before and after the Mexican cession to the United States, in good faith considered to be a part of the Refugio Colony Grant, a Mexican community land grant, and were so held in good faith by the owners of the said grant; and that the commissioners of the said
112 grant, in good faith, allotted and conveyed the said lands to certain members of the said community settled on the said grant; and that the titles and claims of the said allottees thereto were passed and deraigned by a chain of sufficient mesne conveyances to the said W. H. Reinhart; and that the said W. H. Reinhart and his predecessors in title and claim, held, occupied, used, cultivated, improved and possessed the said lands for more than fifteen years, in good faith, under and by virtue of the said conveyances from the commissioners of the Refugio Colony Grant and the said mesne conveyances; and that the said defendant D. B. Smith and his assigns now hold and possess, and are cultivating the said lands under and by virtue of the said conveyances from the commissioners of the Refugio Colony Grant, and the said mesne conveyances, and the said conveyances from the said W. H. Reinhart to defendant D. B. Smith, and subsequent conveyances from defendant D. B. Smith to his said assigns; and that the proper limits of the Refugio Colony Grant were in the year 1903, and many years after the said conveyances from the commissioners of the Refugio Colony Grant, finally determined and fixed by a judgment of the United States Court of Private Land Claims, to which judgment neither the said W. H. Reinhart nor any of his predecessors in title or claim were record parties, so as not to include the said lands and many other lands similarly held under the Refugio Colony Grant;

It is therefore found and adjudged by the Court by way of conclusions of law, that there is now due to the said plaintiff The Third National Exchange Bank of Sandusky, Ohio, upon the said promis-

sory notes, so as aforesaid secured by the said deed of trust
113 to the said plaintiff F. P. Zollinger as trustee, the sum of $13,500.00 as principal, and the further sum of $6,291.03 as interest to the date hereof, and the further sum of $1,500.00 as attorney's fees, and the further sum of $36.05 as costs of this suit, hereby taxed, the said sums amounting in the aggregate to the sum of $21,327.08 now due from the said defendant D. B. Smith to the said plaintiff The Third National Exchange Bank of Sandusky, Ohio, and secured by the said deed of trust of the said defendants D. B. Smith and Gertrude W. Smith; and that the said plaintiff F. P. Zollinger, trustee, or his lawfully constituted substitute, is entitled, upon the completion of the sale of the said lands as hereinafter provided, to a commission and fee of five per cent upon the proceeds of such sale; and that the said lands, and the claims asserted thereto by the said W. H. Reinhart and his predecessors in title and claim were not affected by the said judgment of the United States Court of Private Land Claims, and are not within the purview and intent of the Act of Congress of February 25, 1885, 23 Stat. L. 321, entitled "An Act to prevent unlawful occupancy of the public lands."

Wherefore it is ordered, adjudged and decreed by the court that the said plaintiff F. P. Zollinger, trustee, or his lawfully constituted substitute in case his services shall not be available, shall sell at public vendue, for cash, at the front door of the County Court House of Dona Ana County, New Mexico, between the hours of nine in the morning and the setting of the sun of the same day, and in all
particulars as by law required, after advertising and giving
114 notice of such sale according to law, all the following described lands situate in the county of Dona Ana and state of New Mexico, to-wit:

First. A tract of land containing three hundred and sixty-three and one-tenth (363.1) acres, and being all of a tract of four hundred and fifty-nine and nine-tenths (459.9) acres, embraced within the following field notes:

Beginning at an alamo post for the east corner, standing at the side of an alamo tree, running thence S. 45° W. 2400 feet to a stake for a corner; thence S. 58° W. 1330 feet to a stake; thence S. 11° W. 3130 feet to a post standing on the north bank of the old Rio Grande; thence up the old Rio Grande with its meanders N. 59° W. 990 feet; thence S. 14° E. 830 feet; thence S. 86° W. 280 feet thence N. 60° W. 600 feet; thence N. 22° W. 580 feet; thence N. 30° 600 feet; thence N. 28° E. 600 feet; thence N. 22° E. 500 feet; thence N. 30° E. 900 feet; thence N. 10° W. 600 feet; thence N. 30° W. 500 feet; thence N. 67° W. 1100 feet; thence S. 30° E. 460 feet; thence S. 62° W. 220 feet; thence N. 70° W. 250 feet; thence N. 17° W. 440 feet; thence N. 30° E. 530 feet; thence N. 59° E. 860 feet; thence N. 26° E. 640 feet; thence S. 83° E. 610 feet; thence S. 50° E. 250 feet; thence S. 600 feet to a stake standing on the south bank of the said Rio Grande; thence across the bend of the old Rio Grande N. 42° E. 2300 feet to a stake for the northwest corner situated in a dense alamo thicket from which an alamo tree marked — bears S. 12° E. 29 feet, another alamo tree marked —

bears N. 75° W. 74 feet; and another tree with the same marks bears N. 7½° W. 7 feet thence S. 80° E. 3600 feet to the place of beginning. Except a certain tract of land of ninety-six and
115 eight-tenths (96.8) acres, included within the foregoing field notes of said four hundred and fifty-nine and nine-tenths (459.9) acres, which said tract of ninety-six and eight tenths (96.8) acres is not hereby conveyed or intended to be conveyed, but is especially reserved and excepted from the lands hereby conveyed, and the description herein given of said ninety-six and eight-tenths (96.8) acres is given for the express purpose of identifying said tract of ninety-six and eight-tenths (96.8) acres and segregating the same from the lands hereby conveyed, and said ninety-six and eight-tenths (96.8) acres is here now described as follows:

Beginning at a post standing on the north bank of an old abandoned channel of the Rio Grande (same being the S. E. corner of the above described four hundred and fifty-nine and nine-tenths [459.9] acre tract); thence N. 11° E. 630 varas to the point where it is claimed the northern boundary of grant of land known as the Santa Teresa Grant crosses the eastern boundary of the aforedescribed four hundred and fifty-nine and nine-tenths (459.9) acre tract; thence along and on what is now asserted by claimants of said Santa Teresa Grant to be the northern boundary line of said Santa Teresa Grant; westward to where said asserted or pretended north line of the Santa Teresa Grant intersects said old channel of the Rio Grande, and thence down the center of said old channel of the Rio Grande with its meanders, to the place of beginning, said ninety-six and eight-tenths (96.8) acres being a part of and taken off of the southern end of said four hundred and fifty-nine and nine-tenths (459.9) acre tract described;

116 Second. All that tract of land containing an area of one-hundred and three and three-tenths (103.3) acres, which was acquired by Luis F. Acosta from the commissioners of the Refugio Land Grant on the fourth day of December, 1894, by deed of that date, wherein said tract is described as follows:

From east to west on its south side it measures one thousand (1,000) yards, and is bounded by lands of Canuto Alvarez; from south to north on its west side it measures five hundred (500) yards, and is bounded by the line of the Refugio Grant; from west to east on its north side it measures one thousand (1,000) yards and is bounded by vacant land; and from north to south on the east side it measures five hundred (500) yards, and is bounded by public road and vacant lands.

Third. All that certain tract and parcel of land which was conveyed to Guadalupe Carrasco by the commissioners of the Refugio Land Grant, by deed dated November 24th, 1888, and therein described as follows: From east to west on the north side it measures three hundred (300) yards, and is bounded by lands of Morris Freudenthal; from north to south on its west side it measures one hundred and fifty (150) yards and is bounded by lands of the Refugio Colony Grant; from west to east on the south side it measures three hundred and fifty (350) yards and is bounded by

lands of Tranquillo Fierro; and from south to north on its east side it measures three hundred (300) yards, and is bounded by lands of Lorenzo Carrasco.

Also all and every ditch and water right in any wise pertaining to the lands aforesaid, had and held under the terms and provisions of a certain deed from W. H. Reinhart to the said D. B.
117 Smith, or so much thereof as may be necessary in order to pay the said sum of $21,327.08, together with interest on the sum of $19,791.03, from the date hereof at the rate of eight per cent per annum, the said last mentioned sum being the principal and interest of the said promissory notes, and together with interest on the sum of $1,536.05, from the date hereof at the rate of six per cent per annum, the said last mentioned sum being the attorney's fees and costs of suit, and together with five per cent on the proceeds of such sale as trustee's commission and fee, and together with the costs and expenses of such sale; and that the said F. P. Zollinger, Trustee, or his lawfully constituted substitute as aforesaid, shall convey the same to the purchaser at such sale by a good and sufficient deed; and that the plaintiffs or any of the parties to this suit may become the purchasers at such sale; and that the purchaser at such sale shall be let into possession on production of the said deed for the said lands or any part thereof; and that the said F. P. Zollinger, Trustee, or his lawfully constituted substitute as aforesaid, out of the proceeds of such sale shall retain the costs and expenses of such sale, and five per cent on the proceeds of such sale as his commission and fee, and shall pay to the said plaintiff The Third National Exchange Bank of Sandusky, Ohio, the sum so found due as aforesaid, to-wit, the sum of $21,327.08, together with interest thereon as aforesaid from the date of this judgment and decree, or so much thereof as the said proceeds of such sale will pay.

And it is further ordered, adjudged and decreed by the court that the said defendant, D. B. Smith and Gertrude W. Smith, and
118 all persons claiming or to claim from or under them, or either of them and all persons having liens subsequent to the said deed of trust, and all persons claiming under them, be and they are hereby forever barred and foreclosed of and from all equity of redemption and claim of, in or to the said described lands, and every part and parcel thereof, from and after the date of such sale except so much as may remain free of such sale or shall have been redeemed according to law before the date of such sale.

And it is further ordered, adjudged and decreed by the court that, if the moneys arising from such sale shall be insufficient to pay the said sum so found due, with interest, cost, commission, fees and expenses of sale, as aforesaid, the said F. P. Zollinger, Trustee, or his lawfully constituted substitute as aforesaid, shall specify the amount of such deficiency and balance due in his return to this court on such sale; and that on the coming in of such return a judgment of this court shall be entered that the said plaintiff The Third National Exchange Bank of Sandusky, Ohio, have and recover the amount of such balance of and from the said defendant, D. B. Smith; and that so much of such deficiency judgment as represents principal and in-

terest of the said promissory notes shall bear interest at the rate of eight per cent per annum; and that so much of deficiency judgment as represents attorney's fees, costs, trustee's commissions and expenses of sale shall bear interest at the rate of six per cent per annum; and that the said plaintiff The Third National Exchange Bank of Sandusky, Ohio, shall have execution for the amount of such deficiency judgment with interest and costs.

119 And, it appearing to the satisfaction of the court that the said F. P. Zollinger is not within the State of New Mexico and his services are not available as such trustee, it is ordered by the court that W. H. H. Llewellyn, Esquire, of the County of Dona Ana and State of Mexico, be and he is hereby constituted and appointed substitute trustee in the place and stead of the said F. P. Zollinger, who is hereby removed and discharged as such trustee, and special master in chancery, to make such sale and act in all things as substitute trustee and special master in chancery under the said deed of trust and under this judgment and decree, and to receive the commissions and emoluments hereinabove provided for such trustee.

EDWARD L. MEDLER,
Judge of said Court.

And thereafter, on, to-wit, the 24th day of June, A. D. 1914, there was filed with the clerk of said court, in said cause, a stipulation for corrected decree, which said stipulation is in words and figures following, to-wit:

Stipulation for Corrected Decree.

This stipulation, made and entered into this 22nd day of June, A. D. 1914, by and between plaintiffs and defendants, through their respective attorneys, witnesseth:

That, whereas, in the rendition of final judgment hereon, to-wit, April 30, 1914, there were certain errors of omission and commission; and, whereas, it is the desire of the parties hereto to correct

120 said judgment in accordance with the facts, the findings of fact and conclusions of law as found and made by the court.

It is hereby agreed that an order may be entered by the presiding judge of this court correcting said judgment as follows, to-wit:

(*a*) By inserting in the second line, after the words "coming regularly on for trial," the words "in open court";

(*b*) By striking from the third finding of fact, fourth line from the bottom of page two, after the words "for more than fifteen years," the words "in good faith."

And it is further agreed that the correction of said judgment shall be made in the manner aforesaid, without prejudice to any action taken, or proceeding had, or order made herein co-incidental with the entry of said judgment or subsequent thereto; that the signing of this stipulation shall not be considered or construed as a consent by defendants, or either of them, to the rendition of said judgment or as a waiver of any of their rights in the premises; that the said

correction judgment shall be entered nunc pro tunc as of April 30, 1914, and thereafter said judgment as thus corrected shall stand as though thus originally entered.

And it is further agreed that an order entered herein on said 30th day of April, A. D. 1914, making certain findings of fact requested by defendants, noting defendants' exceptions, granting an appeal from said judgment and fixing the amount of supersedeas
121 bond to be given by defendants herein, shall be considered and shall be and become a part of said judgment as thus corrected.

Las Cruces, N. M., June 22, 1914.

SEYMOUR THURMOND,
W. H. WINTER,
El Paso, Texas;
R. L. YOUNG,
J. H. PAXTON,
Las Cruces, N. M.,
Attorneys for Plaintiff.
F. G. MORRIS,
S. B. GILLETT,
El Paso, Texas;
HOLT & SUTHERLAND,
Las Cruces, N. M.,
Attorneys for Defendants.

And thereafter, on, to-wit, the said 24th day of June, A. D. 1914, there was filed with the clerk of said court, and entered of record in said cause, an order correcting decree, which said order is in words and figures following, to-wit:

Order Correcting Decree.

This cause coming on this day further to be heard upon written and signed stipulation entered into between counsel for the respective parties plaintiff and defendant for the entry of an order correcting, as hereinafter specified, the final judgment and decree heretofore entered herein, on, to-wit, April 30th, 1914, and the court having considered said stipulation, and being sufficiently advised in the premises;

It is therefore considered, ordered, and adjudged and de-
122 creed by the court here that said final judgment and decree be, and the same hereby is, corrected as follows:

(*a*) By inserting in the second line thereof, after the words "com*m*ing regularly on for trial," the words "in open court";

(*b*) By striking from the third finding of fact fourth line from the bottom of page two, after the words "for more than fifteen years," the words "in good faith."

And it is further considered, ordered, adjudged and decreed that the aforesaid corrections of said judgment shall be without prejudice to any action taken, proceeding had, or order made herein co-incidental with the entry of said final judgment and decree, or subse-

quent thereto; that the said correction judgment shall be entered nunc pro tunc as of April 30th, 1914, and thereafter said judgment as thus corrected shall stand as though thus originally entered.

And it is further considered, ordered, adjudged and decreed that an order entered herein on said 30th day of April, 1914, making certain findings of fact requested by defendants, noting defendant's exceptions, granting an appeal from said judgment and fixing the amount of supersedeas bond to be given by defendants herein, shall be considered and shall be and become a part of said judgment as thus corrected.

Dated at Las Cruces, N. M., this 23d day of June, 1914.

EDWARD L. MEDLER,
District Judge.

123 And thereafter, on, to-wit, the 25th day of June, A. D. 1914, there was filed in the office of the clerk of said court, in said cause, a supersedeas bond, which said bond is in words and figures as follows, to-wit:

Supersedeas Bond.

Know all men by these presents: That we, O. H. Baum and H. M. Maple, for and in behalf of D. B. Smith and Gertrude W. Smith, his wife, defendants in the above entitled cause, as principal, and United States Fidelity and Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, plaintiffs in said cause, in the penal sum of Five Thousand Dollars ($5,000.00), for the payment of which well and truly to be made, we bind ourselves, our heirs, administrators, executors and successors, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of June, 1914.

The condition of the foregoing obligation is such that,

Whereas, the above named plaintiffs on, to-wit, the thirtieth day of April, A. D. 1914, obtained a final decree in the District Court of the Third Judicial District of the State of New Mexico, within and for the County of Dona Ana, against the above named defendants D. B. Smith and Gertrude Smith, his wife, among other things adjudging that upon said date there was due to plaintiff The Third National Exchange Bank of Sandusky, Ohio, upon three certain promissory notes, the sum of Thirteen Thousand, Five
124 Hundred Dollars ($13,500.00), with interest in the sum of Six Thousand, Two Hundred and Ninety-one and 03/100 Dollars ($6,291.03), and the further sum on account of attorney's fees of Fifteen Hundred Dollars, ($1500.00), and the further sum of Thirty-six and 05/100 Dollars, costs of suit; and in and by which final decree it was further adjudged that certain tracts of real estate in said final decree specifically described, or so much thereof as might be necessary in order to pay said several sums of money, with interest thereon as in and by said decree allowed, including costs of suit as aforesaid and five per cent on the proceeds of such

sale as trustee's commission and fee and together with the costs and expenses of sale, be sold at public vendure, for cash, at the front door of the county court house of Dona Ana County, New Mexico, as by law provided, the proceeds of such sale to be applied to the costs and expenses of sale, the trustee's commission and the satisfaction and payment of said several amounts so found to be due, together with interest as aforesaid from the date of said final decree, or so much thereof as the said proceeds of sale would pay; and in and by which said final decree it was further adjudged that if the monies arising from such sale should be insufficient to pay the said sum so found due, with interest, costs, commissions, fees and expenses of sale the trustee making sale should specify the amount of such deficiency, and that thereupon judgment should be entered therefor in favor of said plaintiff The Third National Exchange Bank of Sandusky, Ohio, against defendant D. B. Smith, with execution to be issued therefor:—for a particular description
125 of the aforesaid real estate so directed to be sold, reference being hereby made to the record of the aforesaid final decree;

And, Whereas, on, to-wit, said thirtieth day of April, A. D. 1914, upon motion of said defendants an order was entered granting them an appeal from said final decre to the Supreme Court of New Mexico, and fixing the amount of supersedeas bond in said cause in the sum of Five Thousand Dollars ($5,000.00).

Now, Therefore, should the above bounden principals and said defendants prosecute such appeal with due diligence in said Supreme Court, and if the decision and judgment of said Third Judicial District Court be affirmed or the appeal dismissed, should said principals and defendants comply with the decree of said District Court and pay all damages and costs adjudged against them in the District Court and in the Supreme Court on such appeal, then this obligation to be null and void; otherwise to be and remain in full force and effect.

O. H. BAUM. [SEAL.]
H. M. MAPLE.
UNITED STATES FIDELITY & GUARANTEE CO., OF BALTIMORE, MD.
By H. B. HOLT,
Its Att'y in Fact.

STATE OF NEW MEXICO,
County of Dona Ana, ss:

On this 24th day of June, A. D. 1914, before me personally appeared O. H. Baum and H. M. Maple, to me known to be the persons described in and who executed the foregoing instrument, and each for himself, and not one for the other, acknowledged that he executed the same as his free act and deed.

126 In Witness Whereof I have hereunto set my hand and affixed my Notarial seal at my office in Las Cruces, New Mexico, the day and year in this certificate first above written.

[SEAL.] WM. ALEX. SUTHERLAND,
Notary Public, Dona Ana County, New Mexico.

My commission expires 10/11/16.

STATE OF TEXAS,
County of El Paso, ss:

On this 24th day of June, A. D. 1914, before me appeared H. B. Holt, to me personally known, who, being by me duly sworn, did say: that he is the attorney in fact of United States Fidelity and Guaranty Co. of Baltimore, Md., a corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said H. B. Holt acknowledged said instrument to be the free act and deed of said corporation.

H. B. HOLT.

Subscribed, sworn to and acknowledged before me this 24th day of June, A. D. 1914.

[SEAL.] WM. ALEX. SUTHERLAND,
Notary Public, Dona Ana County, New Mexico.

My commission expires 10/11/16.

The foregoing bond as to form and sufficiency of surety approved by me this 25th day of June, 1914.

[Seal of District Court.] C. O. BENNETT,
County Clerk.
By H. F. BENNETT,
Deputy.

127 *Certificate.*

STATE OF NEW MEXICO,
County of Dona Ana, ss:

I, the undersigned, Clerk of the District Court of the Third Judicial District of the State of New Mexico, within and for the County of Dona Ana, in obedience to an order granting an appeal hereinbefore set forth, do hereby certify unto the Supreme Court of New Mexico, the above and foregoing to be a true and complete transcript and copy of so much of the record and proceedings had in the cause lately pending in said court in and for the County of Dona Ana, wherein The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger were plaintiffs, and D. B. Smith and Gertrude W. Smith, his wife, were defendants, as same appears of record in my office, and as I was by a præcipe for transcript of record filed herein requested to make.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Las Cruces, this the 21st day of July, A. D. 1914.

[SEAL.] C. O. BENNETT,
Clerk of the District Court,
By H. F. BENNETT,
Deputy.

128 (Copy of Exhibit No. 3.)

In the District Court of the Third Judicial District of the State of New Mexico within and for the County of Dona Ana.

No. 3059.

THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and F. P ZOLLINGER, Plaintiffs,

vs.

D. B. SMITH and GERTRUDE SMITH, Defendants.

Stipulation.

Now come the plaintiffs in the above entitled suit by their attorneys, Seymour Thurmond, W. H. Winter, R. L. Young and J. H. Paxton, and come the defendants by their attorneys, F. G. Morris, S. B. Gillett, and Holt & Sutherland, and stipulate as follows:

First. That the land in question herein is within the Elkins-Marmon Survey of the Refugio Grant, but is not within the Hall-Coleman Survey of the same, as approved by the decree of the
129 United States Court of Private Land Claims; and that it is included in no other grant from the United States or any other former government, unless it be included in the Refugio Grant as made by a former government; provided that this stipulation shall not be held to exclude proof of good faith on the part of the claimants alleged by the plaintiffs; and provided further that if the land shall be held to be public land of the United States, in that event it is Unsurveyed Public Land.

Second. The plaintiffs have such deed of conveyance from the Refugio Colony Grant owners and mesne chain of conveyances down to W. H. Reinhart and D. B. Smith and wife as they plead in their reply, and such as defendants plead that they hold under.

In witness whereof, the said attorneys have hereunto set their hands this 18th day of November, A. D. 1913.

(Signed) A. S. THURMOND,
W. H. WINTER,
R. L. YOUNG,
J. H. PAXTON,

(Signed) F. G. MORRIS,
S. B. GILLETT, AND
HOLT & SUTHERLAND,
Attorneys for Defendants.

130 And afterwards, on to wit, on the said the third day of September, A. D. 1914, there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, an assignment of errors by appellant, in the above entitled cause, which said assignment of errors, were and are in words and figures following to wit:

In the Supreme Court of the State of New Mexico.

No. 1737.

D. B. SMITH et ux., Appellants,
vs.
THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and F. P. ZOLLINGER, Appellees.

Appeal from District Court, Doña Ana County.

Appellants' Assignment of Errors.

I.

The Court erred in rendering judgment for the plaintiffs below, and in not rendering judgment for the defendants on the pleadings and findings of fact made by the Court in this cause, in that the facts found by the Court show that the notes and mortgage sued on were executed for an illegal consideration in a transaction and sale of public lands of the United States by W. H. Reinhart, which he held under enclosure, to appellant D. E. Smith, involving the assertion by W. H. Reinhart of right to exclusive enclosure, use and occupancy thereof, and delivery of such exclusive possession and enclosure thereof to appellant D. B. Smith, for him to hold by virtue of such enclosure and for him to assert such exclusive use and occupancy thereof, when neither said Reinhart nor D. B. Smith had any claim or color of title to said land, made or acquired in good faith, or asserted right thereto by or under claim made in good faith, with a view to entry thereof at the proper
131 land office under the general laws of the United States, at the time said enclosure was made and continued, of which illegality the plaintiffs had actual knowledge at and before the time they acquired said notes and mortgages, as appears from the findings of fact made by the court.

II.

The Court erred in its conclusion of law that the claim of W. H. Reinhart and his predecessors in title was not affected by the judgment of the United States Court of Private Land Claims, referred to therein.

III.

The Court erred in its conclusion of law that the claim of W. H. Reinhart and his predecessors in title was not within the purview and intent of the Act of Congress of February, 25th, 1885, entitled "An Act to Prevent Unlawful Occupancy of the Public Lands."

IV.

The Court erred in not rendering judgment for the defendants on the findings of fact made by the court that the plaintiff and W. H. Reinhart had and relied on the opinion of H. B. Holt, their attorney, before the said Reinhart bought the land described in the mortgage sued on, informing them that it was public land of the United States, to which their vendors had no title whatever, which precluded said Reinhart from becoming a holder of said land in good faith, believing that he had title thereto.

V.

The Court erred in rendering judgment for plaintiffs below, and in not rendering judgment for defendants, on the pleadings and findings of fact as found by the Court, in that it appears therefrom that there was no valuable consideration moving the defendant D. B. Smith to execute the notes and mortgages sued on, in that W. H. Reinhart had no title or right of possession to the land described in said mortgage and notes the conveyance of
132 which was the sole consideration for the execution of said notes and mortgage, of which lack of consideration for the execution of said notes the plaintiff bank had full knowledge when it acquired said notes, and of the inability of defendants to restore the possession of said land, the same being public land of the United States, to the possession of which defendants had no right or any legal right to deliver possession thereof to the plaintiff.

(Signed) HOLT & SUTHERLAND,
Las Cruces, N. M.;
F. G. MORRIS,
S. B. GILLETT,
El Paso, Texas,
Attorneys for Appellants.

Service of copy of the foregoing assignment of errors and of two copies of transcript of record, acknowledged at Las Cruces, New Mexico, this 1st day of September, A. D., 1914

J. H. PAXTON,
Las Cruces, N. M., Attorney for Appellees.

And afterwards, on to wit, at a regular term of the Supreme Court of the State of New Mexico, begun and held at Santa Fe, the seat of Government, on the Second Wednesday in January A. D., 1915, on the sixth day of the said regular term, the same being Tuesday, January 19th, A. D., 1915, the following among other proceedings were had and entered of record, to wit:

No. 1737.

THE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and F. P. ZOLLINGER, Appellees,

vs.

D. B. SMITH, and GERTRUDE W. SMITH, His Wife, Appellants.

Appeal from District Court, Doña Ana County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by H. B. Holt, Esq., and F. G. Morris, Esq., for appellant, and W. H. Win-
133 ter, Esq., and J. H. Paxton, Esq., for appellees, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

Honorable Frank W. Parker, being disqualified from the hearing of this cause, it is ordered that Honorable E. C. Abbott, of the First Judicial District, be and he hereby is called to participate.

It is ordered that Hon. F. G. Morris, of the Texas Bar, be and he hereby is admitted to the bar of this court for the purposes of this case.

And afterwards, on towit, on the Fifty-sixth day of the said regular term, of the Supreme Court of the State of New Mexico, the same being Tuesday, April, 27th, A. D., 1915, the following among other proceedings were had and entered of record, towit:

No. 1737.

THE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and

F. P. SOLLINGER, Appellees,

vs.

D. B. SMITH and GERTRUDE W. SMITH, His Wife, Appellants.

Appeal from District Court, Doña Ana County.

This cause having been argued by counsel, submitted to and taken under advisement by the court, upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Chief Justice Roberts, Justice Hanna and District Judge Abbott, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; It is therefore considered and adjudged by the court, that the judgment of the district court in and for the county of Dona Ana, whence this cause came into this court, be and the same hereby is affirmed.

It is further considered and adjudged by the court, that this cause, be and the same hereby is, remanded to the said District Court, with instructions to enforce its decree therein.

134 And Afterwards, on towit, on the fourteenth day of May, A. D., 1915, there was filed in the office of the Clerk of the

Supreme Court of the State of New Mexico, a motion for rehearing in the above entitled cause, which said motion for rehearing was and is in the following words and figures, towit:

In the Supreme Court of the State of New Mexico, January Term, A. D. 1915.

No. 1737.

THE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and Z. P. ZOLLINGER, Appellees,

vs.

D. B. SMITH and GERTRUDE W. SMITH, His Wife, Appellants.

Appeal from District Court, Doña Ana County.

Appellants' Motion for Rehearing.

Now come the appellants in the above numbered and styled cause and move the Court to grant them a re-hearing herein, and to set aside the judgment of affirmance rendered in this cause, and reverse the judgment of the court below, and as grounds of this motion show to the Court:

1st. That there is a question decisive of this cause, which was duly submitted by counsel, which has been overlooked by the Court, and was not passed upon in the opinion in this case by the Court, to-wit: The defense that there was no consideration to support the promise of D. B. Smith to pay the notes to secure which the deed of trust or mortgage foreclosed by the judgment in this case, was executed.

This contention was raised by the pleading of the defendants that Reinhart had no title or right of possession to or in the land he sold to Smith, whether Reinhart held possession thereof in such good faith as to then take him out of the criminal statute of 1885
135 or not. The pleading was that there was no other valuable consideration moving Smith to execute the notes, and the notes show by their terms, that they were executed alone for the land, the cash payment having covered all other property conveyed.

This contention was presented in this case by the appellant, viz: V. Assignment of error, on page 11 of their brief. It was argued and supported by authorities in paragraph VII, pages 21 to 26 of said brief.

It was there pointed out that the defendants in obtaining possession of the land did not obtain any right or title or thing of value, whether Reinhart held in good faith or not. This Court has sustained that contention by holding that, as between the United States and Reinhart, the decision of the Court of Private Land Claims was conclusive. That being true, defendants did not obtain any title or right of possession. Since the passage of the Act of 1885 there can be no right of possession of public land of the United States

which one can transmit to another, especially when that other is not a good faith claimant. If a possessor be a claimant in good faith he may not be prosecuted criminally for vesting his possession in another, but the possession is in any event without right, and the possessor cannot pass to another any valuable right. Hence, there is nothing for Smith to return as a condition of this defense, and nothing he could return without being guilty in the very act of returning exclusive possession or asserting that he held such exclusive possession which he could return; and, in doing this, he not being a good faith claimant, would not only be returning something which would be of no value to Reinhart, but would thereby commit an offense against the law.

Authorities are quoted from and cited, and this contention is argued in appellants' brief from page 21 to 26, which we request the Court to consider. This contention was orally argued by counsel for appellants.

136 2nd. Because the Court in passing on the question *in* good faith of Reinhart's holding overlooked the fact that he pleaded that he had advice of counsel, and the proof and the findings of the Court below show that the advice was that the land in question was public domain of the United States. The vice in the reasoning of this Court on authorities quoted from, defining good faith, it is respectfully submitted, consists in using authorities which hold that knowledge of an adverse claim does not necessarily prevent the existence of good faith in one's own claim, as justifying a holding that one's knowledge that he himself had not title, and that the adverse claim is in fact the only title, does not negative a good faith claim of title. The two positions are necessarily contradictory of each other. One who knows he has no title does not and obviously cannot claim in good faith.

3rd. This Court having found that Reinhart knew of the adjudication which declared he had no title, and by virtue of which said adjudication he was advised by counsel that he had no title, and which adjudication was conclusive between him and the United States, in holding that such facts so found do not affect the relative relations between Reinhart and appellants, overlooks the fact that the entire question of legality or illegality is one wholly between the United States, Reinhart and Smith. Appellants do not plead any illegality which affected any right they had against Reinhart, but assume, as was held by this Court in the opinion rendered on the former appeal of this case, that, upon grounds of public policy, Smith is permitted to plead, in the public interest, the illegality existing between Reinhard and the United States and between appellants and the United States. Hence according to the former opinion in this case, which we have assumed would be treated as the law of the case, appellants were permitted to plead the illegality of the contract between Reinhart and Smith, not in virtue of any right

137 Smith might have, as between himself and Reinhart, but solely in the public interest, and with reference alone to the question as it existed between Reinhart and Smith not as between themselves but only as between them and the United States.

This Court in the course of its opinion says:

"It is true he was fully conversant with all the facts." (The Court might have added that he was advised by the attorney, whose advice he pleaded, that those facts showed that the land was public land of the United States.) And the Court below so found, but this Court seems to have overlooked it. The Court further says: "It is probably true that he, as well as other claimants, were legally precluded from asserting title thereto, as against the United States."

The sole question to be considered is one between the claimant and the United States, and appellants are merely permitted to take advantage of that statute by pleading it in the public interest. It was so held by this Court in the former opinion. And, again, this court says, in the last opinion: "But in view of the policy of Congress in disposing of public lands, we do not think that it can be contended that the people who had established homes and settlements upon the allottments made by commissioners of the Grant, which said allottments were of small tracts of land, could be said to be acting in bad faith, in holding possession of *daid* lands, after the confirmation of said grant, and approval of the survey, even though their lands were not within the confirmed portion of the same." And this the Court so holds, notwithstanding they knew of and were bound by said adjudication. Then, we may inquire what was the use of having a Court of Private Land Claims to try out the good faith claims of settlers who held possession and claimed under Mexican Grants public lands of the United States? Was it not the policy and the sole object of Congress in creating that Court to settle such good faith claims under Mexican Grants to the end that
138 the land might be thrown open to legal settlement? Was it not against the public policy and purpose as to legal settlements to permit those without title to occupy the public lands without a view to entry at the land office, and to exclude others from making legal settlements? Does not the Court here, legislate an exception into the statutes of 1885 which is not contained in the statute? The statute takes care of settlers by expressly excepting those who have taken possession in good faith with a view to entry thereof at the proper land office.

The statute expressly excludes from its inhibitions those who are holding "an aserted right thereto by or under claim made in good faith with a view to entry thereof at a proper land office under the general laws of the United States at the time any such enclosure was or shall be made." Now, it is respectfully submitted that this is all the exception the statute makes in favor of settlers, except those who really believe they have a title to public lands, and this, of course, only so long as the United States may not have established its title in a civil suit against such claim of good faith. It were the height of absurdity to hold that the United States could not terminate such original good faith claims by adjudications against them. If the adjudication already had did not terminate such good faith claims, then, not any number of suits by the United States to establish its title would do so.

What it said in the case of Cameron vs. United States and in Tid-

well vs. Chiricahua Cattle Company, 53 Pacific, 192, from which cases this Court quotes in its opinion, was said with reference to the statutes of good faith claims which had not been brought in question and decided against in a civil suit determined in favor of the United States. Therefore, those decisions do not apply to the instant case, wherein there had been an adjudication against the alleged good faith claim in favor of the United States in a
139 court of competent jurisdiction. The authorities cited and quoted from by appellants, on pages 18 to 21, of their brief, hold that after adverse adjudication against a good faith claim, there can be no such thing as good faith in re-asserting such a claim.

We respectfully submit that a re-hearing should be granted in this case and that the judgment of the court below should be reversed, and that judgment should be here rendered for appellants, or, that the trial court should be directed to render such judgment on the findings of fact made by the trial court.

If this motion should be overruled, appellants respectfully request the court to make an order withholding the issuance of a mandate to the lower court for a reasonable time, say, thirty days, in order that appellants may make application for a writ of error to the Supreme Court of the United States, which Court will have jurisdiction on the ground that the defense is rested on a law of the United States.

E. P. and N. E. R. Co., vs. Gutierrez, 215 U. S. 87 and Law Ed. Book 54, page 106.

Respectfully submitted.

(Signed) F. G. MORRIS,
S. B. GILLETT,
HOLT AND SUTHERLAND,
Attorneys for Appellants.

140 And heretofore, on towit, on the twenty-seventh day of April, A. D., 1915, there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, an opinion by the court in the above entitled cause, which said opinion by the court, was and is in the following words and figures towit:

141 In the Supreme Court of the State of New Mexico. January Term, A. D. 1915.

No. 1737.

THE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and E. P. ZOLLINGER, Appellees,

vs.

D. B. SMITH and GERTRUDE W. SMITH, His Wife, Appellants.

Appeal from District Court Dona Ana County.

Syllabus by the Court.

1. Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed or the construction of the instrument under which the party in possession claims title.

2. "Good Faith", in the creation or acquisition of color of title, is freedom from a design to defraud the person having the better title, and the knowledge of an adverse claim to, or lien upon property, does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien.

3. A holder of color of title to a small tract of government land embraced within the limits of the original survey of a Mexican Land Grant, which was without the limits of such Grant as finally confirmed by the Court of Private Land Claims, who had, or whose predecessors in title had expended large sums in improving the land, and, where the original allotment of said land and the settlement and improvements thereon had been made in good faith, has "claim or color of title made or acquired in good faith" within the spirit of the Act of Congress of February 25, 1885, 23 Stat. 321, c. 149. Hence a contract for the sale of said land is not an illegal contract.

142 *Statement of the Facts.*

The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, as Trustee, sued the appellants D. B. Smith and his wife, Gertrude W. Smith, to recover on three promissory notes, each for the sum of Forty-five hundred ($4500.00) dollars and interest and attorney's fees, which were executed by the appellant D. B. Smith to W. H. Reinhart for the purchase money agreed by appellants to be paid for certain tracts of land, and to foreclose a mortgage deed of trust executed by D. B. Smith and his wife, Gertrude W. Smith, to secure the payment of said notes, of even date with said notes, and conveying the trust to F. P. Zollinger the said tracts of land for the purchase of which said notes were executed.

The defendants answered said complaint, pleading, among other

things, illegality of the notes and deed of trust, in that the land sold by W. H. Reinhart to D. B. Smith for which the notes were executed, and to secure the payment of which D. B. Smith and wife executed the deed of trust sued on, was, at the time of said transaction, public land of the United States, and that exclusive possession, use and claim of ownership was taken and asserted by said Reinhart and transferred to said Smith, who accepted such exclusive possession, use and claim of said land, when, in fact, neither said Reinhart nor said Smith held the same under color of title in good faith or with a view to entering the same under the laws of the United States at the proper land office.

The plaintiff demurred to said plea of illegality, and the court having sustained such demurrer in-so-far as the plea applied to the deed of trust sought to be foreclosed, and the defendants not having asked leave to amend or having filed any amended answer, the court rendered judgment foreclosing the deed of trust sued on and ordering sale of land described therein to realize money to pay the amount due on said notes.

Defendants appealed from the judgment to this court,
143 which reversed the judgment of the court below and remanded the cause for a new trial. The case is reported in 17 N. M. 166-188; 125 Pac. 632.

After the mandate of this court was *a* filed in the court below, the defendants filed in the District Court their first amended answer, wherein they pleaded illegality, as before, and pleaded the facts intended to negative all good faith holding by said Reinhart and said defendant D. B. Smith of said public land, and also pleaded an estoppel on the part of said Reinhart and the plaintiff holders of the notes sued on to plead in this case a good faith holding of said land or of said notes, in that in the years 1891-3 in a suit brought by the Grant of the Colony of Refugio, a corporation, in the United States Court of Private Land Claims, wherein said corporation lawfully represented all the parties interested in said grant, and especially the remote grantor of plaintiffs, Leon Alvares, who was named in the act of incorporation of said grant as a member thereof there was a judgment rendered establishing the boundaries of said colony grant in such manner as to exclude therefrom the land described in said notes and in said deed of trust, whereby said land not being covered, or claimed to be covered, by any other grant from any sovereignty of the soil, was shown to be public land of the United States; that no appeal was prosecuted from said judgment and the same became final and binding in said matters; of which decree the said Reinhart and D. B. Smith had knowledge when said Reinhart conveyed said land and delivered exclusive possession and use thereof to D. B. Smith, and when D. B. Smith accepted the same and executed the notes and deed of trust sued on, and that the plaintiff Bank and F. P. Zollinger, trustee for said Bank, each at the time said notes were indorsed to them, had knowledge of said judgment and of the fact that said land was public land of the United States, and was not held
under color of title in good faith or with a view to entering
144 the same under laws of the United States, wherefore the Act of Congress of the United States of 1885 forbidding and pen-

alizing occupancy of public land and the public policy of said Act forbade any plea of good faith holding by those having knowledge of such adjudication.

The defendant further pleaded that there was no valuable consideration moving between said Reinhart and D. B. Smith and his wife, Gertrude W. Smith, to create any legal obligation on their part to pay said notes or to support said deed of trust as security, in that the said Reinhart had no title or right *of* possession in said land the said Reinhart had no title or right *of* possession in said land and all of which was known to the plaintiff Bank when it accepted indorsement of said notes to it for value, for which want of consideration under the laws of Texas pleaded by defendants, where said notes were executed, and which were made payable in El Paso, Texas, they were unenforcible for want of a valuable consideration to support them.

Plaintiffs filed their reply to defendant's amended answer, alleging among other replies that Reinhart was, at the time he conveyed to appellant D. B. Smith, in actual possession of the land, "and claiming the same in good faith under deeds and mesne conveyances and under color of title therefore acquired in good faith and for value," and then proceed to set out with particularity the several deeds and conveyances under which Reinhart claimed in the land, commencing with a deed from one Allen Potter to him, Reinhart, of date January 25th, 1909, and running back to a number of deeds from the commissioners of the Colony of Refugio to the various grantees of said colony under whom he, Reinhart, claimed title, the deeds from said commissioners of said colony to their immediate grantors all being dated in and about the year 1888, some three years prior to the Act of Congress creating the Court of Private Land Claims.

145 "And plaintiffs say that each and all of said deeds constituted a valid claim and color of title to said lands; and that under the same the respective grantees acquired, and thereafter, until the same had been conveyed by deed to their respective grantees, as above stated, asserted claim to said lands hereinbefore described, which deeds constitute his claim and color of title thereto."

Plaintiffs in the "third" paragraph of their reply, denied that Reinhart or any of his predecessors in title were in any wise parties to the suit and judgment rendered therein before the Court of Private Land Claims, and denied that he or any of his predecessors in title were in anywise bound by the judgment.

The case was tried to the court and final judgment was rendered for plaintiffs for the debt and interest represented by the three notes, for $1,500.00 attorney's fees, etc., with foreclosure of the mortgage or deed of trust lien.

Upon motion and request of defendant, the trial judge made and filed certain findings of fact. Among other findings of fact are, "Third":

"and that said lands were for many years, before and after the Mexican cession *of* the United States, in good faith considered to be a part of the Refugio Colony Grant, a Mexican Community Grant, and were so held in good faith, by the owners of the said

grant; and that the commissioners of the said grant, in good faith, allotted and conveyed the said lands to certain *numbers* of said community who settled on the said grant; and that the titles and claims of the allottees thereto were passed and deraigned by a chain of sufficient mesne conveyance to the said W. H. Reinhart; and that said W. H. Reinhart and his predecessors in title and claim held, occupied and possessed the said lands for more than fifteen years, under and by virtue of the conveyances from the commissioners of the Refugio Colony Grant and the said mesne conveyances; and that the said defendant D. B. Smith and his assigns now hold and
146 possess and are cultivating the said lands under and by virture of the said conveyances from the commissioners of the Refugio Colony Grant, and the said mesne conveyances, and the said conveyance from the said W. H. Reinhart to defendant D. B. Smith, and subsequent conveyances from D. B. Smith to his said assigns."

Upon the trial it was, by stipulation, agreed that—

"The plaintiffs have such deed of conveyance from the Refugio Colony Grant owners and mesne chain of conveyances down to W. H. Reinhart and D. B. Smith and wife as they plead in their reply and such as defendants plead that they hold under."

During the examination of a witness for plaintiffs, Dionicio Alvarez, counsel for defendants made the following "admission":

"It is admitted by the defendants, for the purpose of shortening the testimony, that the parties mentioned in the chain of transfers from the Refugio Colony down to the date of the rendition of the decree of the Court of Private Land Claims in evidence were holders under the chain of title mentioned, in good faith, under color of title and in good faith."

The facts out of which this litigation arose, may be briefly stated as follows:—

In 1851 the government of Mexico granted certain lands now embraced within the limits of Doña Ana County, this state, to the Colony of Refugio. The grant was similar to many others found in this state. Settlements were made upon it by many people, and individual allotments were made from time to time by the commissioners.

The territorial legislature, by the Act of March 7th, 1884, constituted the owners of lands within the limits of the grant a body corporate and politic under the name and style of the Grant of the Colony of Refugio, under which they were authorized by said act to sue and be sued and have perpetual succession.

147 Many years ago the lands involved in this litigation, embracing some 400 acres were allotted to ten individuals, who subsequently, by separate deeds of conveyance, transferred the same to Leon Alvarez, probably some time in the 80's, but the date is wholly immaterial. From that time to 1909 various deeds were executed to divers parties, all of whom had possession and cultivated and improved the lands. Something like six or seven thousand dollars, possibly more, having been expended in improvements on the land in constructing irrigation ditches. In 1909 W. H. Rein-

hart claimed to be the owner of the lands, under deeds of conveyance, and was in possession of the same. In that year he conveyed the same to D. B. Smith, the appellant here, receiving perhaps one-half of the purchase money in cash, and to secure the balance took Smith's promissory notes, secured by a mortgage on the real estate. The notes aggregated $13,500.00. It is not disputed that Reinhart was the owner of said lands if the original allottees were invested with the legal title to the same.

Some time prior to 1893, the grant was surveyed by Elkins & Marmon, and the lands in question here were within the limits of that survey. In 1893, the commissioners of the grant, acting under the power and authority conferred by the Act of March 7, 1884 instituted proceedings in the United States Court of Private Land Claims to have the title of said grant confirmed and settled. Leon Álvarez was one of the commissioners of the grant at that time and acting as such. The title of the grant was confirmed and a survey was ordered to determine what lands were embraced within the limits of the same. This survey was made by the Surveyor General of New Mexico and reported to the court, and the title to the lands so embraced within the limits of such survey was confirmed in the Colony of Refugio. This survey, so made as aforesaid, embraced a smaller tract than did the Elkins & Marmon survey, and
148 the lands in question here, together with other lands was without the limits of the survey, made under the direction and by authority of the Court of Private Land Claims. The judgment of the court of Private Land Claims establishing the boundaries and confirming the title to the lands within the limits of such survey, so made by the surveyor general of New Mexico, was entered in the year 1903, and from which no appeal was taken.

The parties owning land without the limits of the grant as confirmed, but within the Elkins & Marmon survey continued in possession thereof and resided thereon with their families, and dealt with said lands as though they had been invested with the legal title to the same. No action was ever taken by the United States, so far as the record discloses, to dispossess them, although the legal title to said lands was in the United States. In 1909, when the deed to Smith was executed by Reinhart a bill was pending before Congress to validate the titles of the bona fide claimants to said lands, so found to be without the limits of the confirmed survey.

The notes and mortgage securing the same, executed by Smith, were transferred by Reinhart to the appellee some time in the year 1909 for value. All parties concerned were fully advised as to the condition of the title to the lands involved.

Smith refused to pay the notes when they became due, and this suit was instituted by the bank to recover thereon and for foreclosure of the mortgage.

From the judgment for the amount called for by the notes, and foreclosing the deed of trust appellants prosecute this appeal.

Opinion of the Court.

ROBERTS, *C. J.*:

When this case was before this court at a former hearing (17 N. M. 166), the court had for consideration only the com-
149 plaint, answer and demurrer thereto. The answer proceeded upon the theory that the notes and trust deed were illegal, in that they were made in the course of, and as a part of a deed of sale and assertion of exclusive possession of vendor and vendee of public lands of the United States, of which appellees had notice, being parties to said illegal transaction. The answer also set up the Federal Statute (Act of Feb. 25, 1885, ch. 149, 23 Stat. L. 321, 6 Fed. Stat. Ann. 533) and alleged that the parties were holding, using and occupying said lands in violation of the same. In holding that the answer stated a good defense we said:

"If issue should be joined upon the allegations of the answer and the proof should establish, as it did in the case of Tidwell v. Chiricahua Cattle Co. (53 Pac. 192), that Reinhart held the land in good faith under conveyance, he would then bring himself clearly within the doctrine laid down, and his act would not be in contravention of the act of Congress in question."

Upon this appeal, the only question which requires consideration is whether the evidence shows that Reinhart had "no claim or color of title made or acquired in good faith" to the land in question at the time he conveyed the same. If he did not, the judgment must be reversed; on the other hand if he had color of title to the land, made or acquired in good faith, the judgment entered was proper and must be affirmed.

The federal Statute, under which it is claimed Reinhart's possession and occupancy was illegal reads as follows:

"That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an
150 asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right, as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited. (23 Stat. L. 321.)

The supreme court of the United States, in the case of Cameron

v. United States, 148 U. S. 301, construed this section of the statute, saying:

"The act of Congress which forms the basis of this proceeding was passed in view of a practice which had become common in the Western Territories of enclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to such lands, and surrounding them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence. The law was, however, never intended to operate upon persons who had taken possession under a bona fide claim or color of title; nor was it intended that, in a proceeding to abate a fence erected in good faith, the legal validity of the defendant's title to the land should be put in issue. It is a sufficient defense to such a proceeding to show that the lands enclosed were not public lands of the United States, or that defendant had claim or color of title, made or acquired in good faith, or an asserted right thereto, by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United
151 States. As the question whether the lands enclosed by the defendant in this case were public lands of the United States depends upon the questions whether he had claim or color of title to them, the two questions may be properly considered together.

The deed from Potter to Reinhart constituted color of title, so that the only question of any practical importance for determination is whether Reinhart's title was acquired and held in good faith, within the meaning of the Act of Congress. The purpose in view by Congress in enacting the statute is clearly pointed out by the U. S. Supreme Court in the foregoing quotation. It was never intended to operate upon persons who took and held possession of government land under a bona fide claim or color of title, as pointed out by that court.

In the same case the court says:

"Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether such doubt arises from the circumstances under which the land is held, the identity of the land conveyed or the construction to the instrument under which the party in possession claims title."

And in the case of Searl v. School District, 133 U. S. 553, 33 L. Ed. 740, Chief Justice Fuller, for the court said:

"As remarked by Beckwith, J., in McCagg v. Heacock, 34 Ill. 476, 479, 'The good faith required by the statute, in the creation or acquisition of color of title is freedom from a design to defraud the person having the better title;' and 'the knowledge of an adverse claim to, or lien upon, property, does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien.'"

Tested by this rule, in connection with the evident purpose of the statute, do the facts in this case bring Reinhart without the rule?

152 It is true he was fully conversant with all the facts regarding the status of his title. He knew that his lands were not within the confirmed portion of the Refugio Colony Grant, but that the same were within the Marmon & Elkins survey, and claimed by his grantors, and others similarly situated to have been within the limits of the original Grant, as made by the Mexican Government. It is probably true that he, as well as the other claimants were legally precluded from asserting title thereto as against the United States, but in view of the policy of Congress in disposing of public lands, we do not think that it can be contended that the people who had established homes and settlements upon the allotments made by the commissioners of the grant, which said allotments were of small tracts of land, could be said to be acting in bad faith, in holding possession of said lands, after the confirmation of said grant and the approval of the survey, even though their lands were not within the confirmed portions of the same. It has been the policy of Congress to encourage citizens to establish their homes upon, improve and cultivate lands, and increase the material wealth of the country. These people had all acted in good faith, and in full reliance upon the validity of their titles. In the present case much money had been expended in improving the land and bringing it under cultivation. Under the facts in this case it would be a violent presumption we believe, to assume that the national government would *outs* these bona fide settlers from the lands in question, take from them their homes and deprive them of the usufruct of years of toil and labor. Nor is it any evidence of bad faith on their part, that they continued to reside upon the lands, assuming that they knew the legal title to the same rested in the United States government. While Reinhart may have been within the strict letter of the *statite* (Act of Congress, supra), he was not within its spirit.

153 Smith, the appellant, testified on the witness stand that he, or his grantees were now in possession of the land, claiming to own it. While thus holding possession and enjoying the benefits of the property he obtained from Reinhart, and refusing to restore to him the title and possession of the same, he seeks to avoid liability for the balance due. Fortunately under the facts in the case, the law will not permit him to do this. The judgment of the trial court will be affirmed, and, it is so ordered.

CLARENCE J. ROBERTS,
Chief Justice.

We Concur:

RICHARD H. HANNA, *J.*
EDMUND C. ABBOTT, *D. J.*

April 27th, 1915.

154 STATE OF NEW MEXICO,
Supreme Court, ss:

I, José D. Sena, Clerk of said Court, do hereby certify that the foregoing pages from 1 to 153, inclusive, are a true, full and com-

plete copy of those parts of the transcript of record and proceedings, in the case of the Third National Exchange Bank of Sandusky, Ohio, and E. P. Zollinger, appellees, vs. D. B. Smith, and Gertrude Smith, his wife, Appellants, which are required by the praecipe filed herein by plaintiff- in error, and also the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at my office, in Santa Fé, New Mexico, this the 2nd day of August, A. D., 1915.

[Seal Supreme Court, State of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

155 And afterwards, on the seventh day of June, A. D., 1915, there was filed in the office of the clerk of the Supreme Court of the State of New Mexico, an Assignment of error on writ of error from the Supreme Court of the United States, which said Assignment of error on writ of error from the Supreme Court of the United States, was and is in the following words and figures following towit:

In the Suop-eme Court of New Mexico.

No. 1737.

THE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and F. P. ZOLLINGER, Appellees,

vs.

D. B. SMITH and GERTRUDE W. SMITH, His Wife, Appellants.

Assignment of Error on Writ of Error from the Supreme Court of the United States.

Now come the plaintiffs in error and respectfully submit that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of New Mexico, in the above entitled cause, there is manifest error in this, *wo*-wit:

I.

The Supreme Court of New Mexico having found as facts that the land sold by W. H. Reinhart to plaintiff in error D. B. Smith, and in consideration of which sale D. B. Smith executed the notes and mortgage sued on, was public land of the United States and that the defendants in error in purchasing said notes knew that it was public land, and having found as facts that said Rein-
156 hart had by said sale attempted to vest in D. B. Smith exclusive claim and possession thereof under enclosure, and that said Smith as a part of said transaction accepted said exclusive possession and enclosire and set up exclusive claim to said public

land, the Court erred in holding as matter of law, that said Reinhart, notwithstanding these facts and his knowledge that he had no title, might nevertheless have been holding said land in good faith at the time he sold the same to D. B. Smith and took back the mortgage thereon to secure the vendors' lien notes sued on herein, and that therefore the transaction and contract sued on was not shown to be illegal and unenforcible as an executory contract at the suit of the holders of said notes and mortgage which they acquired with full notice of all the facts found by the Court.

II.

The Supreme Court of New Mexico having found as facts that W. H. Reinhart and D. B. Smith knew that said Reinhart had no title to the land he sold to D. B. Smith at the time of the Transaction in question between them in 1909, long after the judgment of the Court of Private Land Claims was rendered, which in effect adjudicated that said land was public land of the United States, the Court erred in holding that said Reinhart could lawfully set up exclusive possession and claim of said land, in good faith, because of the fact that *remove* vendees in the chain of title under which he held had possessed the land under color of title and in good faith before the decision was rendered in the suit of the Corporation of Refugio vs. The United States, to which they were parties as incorporators of the Corporation which sued for them in the Court of Private Land Claims; said good faith claim of said remote vendees having as a matter of law been extinguished by the adverse decree in that suit, so that they nor their vendees did not thereafter have any good faith claim which could have been passed by assignment to said Reinhart.

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III.

The Supreme Court of New Mexico having found as facts that in the suit of the Corporation of Refugio vs. The United States in the Court of Private Land Claims, a decree was rendered that the land covered by the mortgage sued on herein was not a part of the Refugio Colony Grant and was therefore public land of the United States, and that said Reinhart and Smith were in privity with such decree and were bound by it, and had full knowledge of it, The Court erred in not holding, as contended by appellants in that court, that it was the policy of the statute creating the Court of Private Land Claims to afford means of settling good faith claims then existing in claimants under Spanish and Mexican land grants by either sustaining the title of the claimants, or clearing up the title of the United States from the good faith claims of such claimants to the end that the further possession of such lands as were adjudicated to the United States might be protected from further exclusive claims and possession and enclosure of such claimants, or their assigns, after such adjudications were had at their instance or in a proper suit by the United States, and that it was against, not only

the rule of res adjudicata but against the public policy of said Act creating the Court of Private Land Claims, and of the Act of Feb. 25, 1885, rendering unlawful all exclusive claims and possession of public land not held in good faith, etc., to permit further holding of possession of public land by parties or privies *to* such judgments were rendered and had become final, and in not holding that, therefore, the said Reinhart and the defendants in error who purchased said notes with knowledge of all these facts, were estopped to set up or claim that the holdings of said Reinhart were nevertheless in fact in good faith.

IV.

The Supreme Court of New Mexico having found as fact- that the land for which these notes and mortgages sued on was public
158 land of the United States when Reinhar*d* attempted to make title thereto, and that there was no consideration, other than said land, to support the promise to pay given in said notes (the improvements thereon being fixtures which become the property of the United States upon being placed on said land), the Court erred in holding that the said notes were legal and enforcible and that the said mortgage, which was a mere incident or security for the notes, was legally enforcible, and in not holding that the defense of want of consideration to support the promise to pay, aside from the question of the illegality of the transaction, should be sustained; it being apparent from the finding of facts by the Court that plaintiff- in error *has* acquired nothing of value from defendants in error.

(Signed) F. G. MORRIS,
El Paso, Tex.;

(Signed) HOLT & SUTHERLAND,
Las Cruces, N. M.,
Attorneys for Plaintiffs in Error, D. B. Smith and Gertrude W. Smith.

And afterwards, on to wit *on* the said the seventh day of June, A. D. 1915, there was filed in the office of the said Clerk of the Supreme Court of the State of New Mexico, a Petition for writ of error in the above entitled cause, which said petition for writ of error was and is in the following words and figures towit:

In the Supreme Court of New Mexico.

No. 1737.

HE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and F. P. ZOLLINGER, Appellees,

vs.

D. B. SMITH and GERTRUDE W. SMITH, His Wife, Appellants.

Petition for Writ of Error.

o the Honorable Clarence J. Roberts, Chief Justice of the Supreme Court of the State of New Mexico:

59 The Petitioners, D. B. Smith and Gertrude W. Smith, appellants in the above numbered and styled cause, respectully show that on the 27th day of April, 1915, the Supreme Court f the State of New Mexico, rendered a final judgment against your etitioners, in the foregoing styled and numbered cause, wherein our petitioners were appellants, and the Third National Exchange Bank of Sandusky, Ohio, and Z. P. Zollinger were appellees, affirmng the judgment of the District Court of the Third Judicial Disrict of the State of New Mexico, holden in Doña Ana County, New Mexico, rendered by said District Court for said appellees, for-closng the mortgage pleaded in the complaint of appellees, as it appears in the record, on the land therein described for the sum of Thirteen Thousand Five Hundred Dollars ($13,500), principal, and Six Thousand Two Hundred Ninety-one and 3/100 Dollars ($6,291.03) interest, and fifteen hundred dollars ($1,500) as attorney's fees stipulated for in the notes, for the payment of which said foreclosure was decreed and $36.05 costs, and ordering the sale of said land to realize money with which to pay said sums of money and costs of making said sale, and providing for the subsequent rendition of a personal deficiency judgment against the appellant, D. B. Smith, for such part of the judgment and costs, if any, as should not be satisfied by the money realized from said sale; the said judgment of affirmance being also rendered against the appellants, in favor of said appellees, for the cost of said appeal, as will appear by reference to the record and proceedings in said cause. That said Supreme Court of New Mexico is the highest court of said State in which a decision in said suit could be had.

And your petitioner- claims the right to remove said judgment to the Supreme Court of the United States by Writ of Error under Section No. 237 of the Judicial Code of the United States, because the appellants in said cause claimed a right and immunity from the liabilities sought to be enforced in said cause against them,

160 under a statute of the United States, which defense was especially set up and claimed by appellants as a defense to said suit both in the said Third Judicial District Court by appropriate answer and pleading filed in due time therein, and in the

Supreme Court of the State of New Mexico; in due time and by the appropriate procedure in said court, on said appeal, prior to the rendition of judgment therein, in this, to-wit:

That in the trial court these defendants pleaded in their answer in bar of this suit *that* the notes for payment of which the mortgage therein pleaded was sought to be foreclosed and said mortgage was executed as a part of a certain illegal transaction and contract wherein one R. H. Reinhart being in exclusive possession under inclosure of public land of the United States, and asserting exclusive claim of ownership of certain public land of the United States sold and vested in appellant, D. B. Smith, such exclusive possession and claim of said public land under said inclosure, which possession said D. B. Smith in said Transaction accepted and set up exclusive claim of possession and ownership thereunder, and executed said notes and mortgage to secure the payment of said notes as a part of said illegal transaction and without other consideration than said notes as a part of said illegal transaction and without other consideration than said sale and vestiture of said Smith with said exclusive possession and exclusive claim to said public land under said enclosure, which exclusive occupancy under enclosure and assertion of exclusive claim thereto by said Reinhart and appellant, D. B. Smith, was without any good faith, claim or color of title made or acquired by either of them in good faith, or asserted right thereto by or under claim made in good faith with a view to entry
161 thereof at the proper land office under the General Laws of the United States at the time of said possession and asserted right, and that said contract and transaction were made in violation of an Act of Congress entitled: "An Act to Prevent Unlawful Occupancy of the Public Lands", (23 Stat. 321, Compiled Laws of U. S. Sec. 2427, passed Feb. 25, 1885) as appears by the record of the proceedings in said cause, of which your Honor is cognizant.

Your petitioners file herewith their Assignment of Errors.

Wherefore, your petitioners pray the allowance of a writ of Error returnable into the Supreme Court of the United States and for citation and supercedeas; and your petitioner will ever pray, etc.

(Signed) F. G. MORRIS,
El Paso Tex.;

(Signed) H. B. HOLT,
Las Cruces, N. M.,
Attorneys for Petitioners.

Writ of Error allowed upon the execution of a bond in the sum of $4,000.00, said bond when approved to act as a supersedeas.

June 7th. 1915.

(Signed) CLARENCE J. ROBERTS,
Chief Justice of the Supreme Court of the State of New Mexico.

162 And Afterwards, on towit, *on* the seventh day of June, A. D., 1915, there was filed in the office of the clerk of the Supreme Court of the State of New Mexico, an affidavit of Value,

which said affidavit of value, was and is in the following words and figures following towit:

THE STATE OF TEXAS,
County of El Paso, ss:

Before me, the undersigned authority, on this day personally appeared, James G. McNary, who after being by me duly sworn stated on oath that he knows the location, quality and value of the tract of land situated in New Mexico near the boundary line between New Mexico and Texas in the Velley of the Rio Grande, known as the Gotto Ranch, consisting of about three hundred sixty three (363) acres, and which is the land involved in the foreclosure suit of the Third National Exchange Bank of Sandusky, Ohio, F. P. Zollinger against D. B. Smith and wife. That affiant is frequently in the locality of said tract of land and has often viewed it and is well acquainted with the lands surrounding said tract and their actual value and other lands in the vicinity of this land and similarly situated, and that he is of the opinion that said Gotto Ranch tract is of the market value of not less that One Hundred and Fifty ($150.00) Dollars per acre.

(Signed) JAMES G. McNARY.

Subscribed and sworn to by James G. McNary before me this 4th day of June, 1915.

[SEAL.] (Signed) J. E. PIERSON,
Notary Public in and for El Paso County, Texas.

And afterwards, on towit *on* the said the seventh day of June, A. D., 1915, there was filed in the office of the clerk of the
163 Supreme Court of the State of New Mexico, a Bond for writ of error, in the above entitled cause, which said Bond for Writ of Error was and is in the following words and figures following to wit:

In the Supreme Court of New Mexico.

No. 1737.

THE THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, and F. P. ZOLLINGER, Appellees,

vs.

D. B. SMITH and GERTRUDE W. SMITH, His Wife, Appellants.

Bond for Writ of Error.

Known all men by these presents: That we, D. B. Smith and Gertrude W. Smith, as principals, and United States Fidelity and Guaranty Co. of Baltimore, Md., as sureties, are held and firmly bound unto the Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, in the sum of Four Thousand Dollars to be paid to the said obligees, their successors, representatives and assigns, we

bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the seventh day of June, A. D., 1915.

Whereas, D. B. Smith and Gertrude W. Smith, appellants in said cause in the Supreme Court of the State of New Mexico, have prosecuted a Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the foregoing entitled cause by the Supreme Court of the State of New Mexico;

Now, therefore, the condition of this obligation is such that the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void
164 otherwise to remain in full force and effect.

(Signed) D. B. SMITH AND
GERTRUDE SMITH,
Principals.
By F. G. MOORIS AND
H. B. HOLT,
Their Attorneys.
(Signed) H. M. MAPLE, *Sureties.*
(Signed) O. H. BROWN.
[SEAL.] (Signed) UNITED STATES FIDELITY
AND GUARANTY COMPANY,
By CARL A. BISHOP AND
C. C. CATRON,
Its Attorneys in Fact.

Approved this 7th day of June, 1915.
(Signed) CLARENCE J. ROBERTS,
Chief Justice of the Supreme Court of New Mexico.

STATE OF NEW MEXICO,
County of Santa Fe, ss:

On this 7th day of June, 1915, before me personally came Carl A. Bishop and C. C. Catron, known to me to be the attorneys-in-fact of The United States Fidelity and Guaranty Company, a corporation described in and which executed the within and foregoing bond of D. B. Smith and Gertrude W. Smith as a surety thereon, and who being by me duly sworn do each depose and say, each for himself and not one for the other, that he resides in the City of Santa Fe, State of New Mexico; that he is the attorney-in-fact of said company and knows the corporate seal thereof; that the said The United States *Dife*lity and Guaranty Company is duly and legally incorporated under the laws of the State of Maryland; that the seal affixed to the within bond is the corporate seal of said Company and was hereby affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as attorney-in-fact of said Company; and that the signatures of said Carl A. Bishop and C. C. Catron subscribed to

said bond is the genuine handwriting of Carl A. Bishop and C. C. Catron and was thereto subscribed by order and authority of said Board of Directors; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and
165 liabi-ties of every nature by more than the sum of One Million Dollars; that The United States Fidelity and Guaranty Company has complied with all the laws of the State of New Mexico, relating to surety companies doing business in said State and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexec.

(Signed) CARL A. BISHOP,
(Signed) C. C. CATRON,
Deponents' Signature.

Sworn to and asknowledged to before me, and subscribed in my presence this 8th day of June 1915.

[SEAL.] (Signed) ALBERT CLANCY,
Notary Public.

My Commission expires August 20, 1916.

And Afterwards, on towit, *on* the 23rd day of June, A. D., 1915 there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, a Præcipe for record which said præcipe for record was and is in the following words and figures towit:

In the Supreme Court of the State of New Mexico.

No. 1737.

D. B. SMITH et ux., Plaintiffs in Error,
vs.
THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, et al.,
Defendants in Error.

To José D. Sena, Clerk of the Supreme Court of New Mexico:

You are hereby directed that in making up the record for the Supreme Court of the United States to copy the following parts thereof omitting all matter not called for in this præcipe, and Counsel for Defendants in Error are hereby notified of this
166 præcipe to the end that they may designate for copying into the record other parts of the record if they shall deem the same material to a decision of the assignments of error filed by plaintiffs in error, a copy of which has been furnished them. The references are to the printed record:

1. The title page and caption of the record of the trial court and mandate of the Supreme Court on former hearing and introductory matter to complaint and complaint and exhibits thereto, all of which matter runs from pages 1 to 30 in the printed record of the case on file in the Supreme Court of New Mexico.

2. The reference to the answer and the answer and exhibits thereto from page 30 to 85 of the printed record.

3. The note of reference to the filing of the reply to the answer and the reply from page 85 to 95.

4. All on pages 96 to where 5 begins on 101.

5. Order of Court page 101 and 102 of printed record including introductory reference thereto.

6. Introductory reference to filing of finding of fact by the trial court and findings of fact on page 102 to 108 of printed record.

7. Introductory reference to final judgment and final judgment in printed record on page 108 to 118.

8. Reference to stipulation for corrected decree and said stipulation on pages 118 to 120 of printed record.

9. Reference to an Order correcting Decree on pages 120 to 121.

10. Certificate of Clerk of lower court page 128.

11. Reference to supercedeas bond and said bond, pages 123 to 125.

12. Introductory to and copy of stipulation of Counsel, pages 236 and 237.

13. Judgment of the Supreme Court of New Mexico.

14. Opinion of the Supreme Court of New Mexico.

167 15. Copy of Petition for Writ of Error and endorsements thereon of allowance and fixing bond.

16. Copy of Assignment of Errors.

15. Copy of bond for Writ of error.

No copy should be made of Writ of Error or Citation in Error as the originals will be attached to the Copy of the Record to be returned to the United States Supreme Court.

(Signed) H. B. HOLT,
(Signed) F. G. MORRIS,
Attorneys for Plaintiffs in Error.

We accept service of the foregoing præcipe and a copy of assignment of errors of plaintiffs in error this the 21st day of June 1915.

(Signed) A. S. THURMOND,
(Signed) J. H. PAXTON,
(Signed) R. L. YOUNG,
(Signed) W. H. WINTER,
Attorneys for Defendants in Error.

168 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of New Mexico, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between the Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, appellees in said court, and plaintiffs in error, D. B. Smith and Gertrude W. Smith, appellants

in said State Court, wherein a right and immunity was claimed by said appellants, now plaintiffs in error, under statutes of the United States, which right and immunity was in said suit especially set up and claimed, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, and then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same at Washington within sixty days from the date hereof, in the said Supreme Court that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

169 Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 7th day of June in the year of Our Lord, nineteen hundred and fifteen. Issued same day.

[Seal United States District Court, District of New Mexico, 1912.]

HOWARD F. LEE,
Clerk of the United States District Court of the District of the State of New Mexico, under Seal of said United States District Court.

Allowed.
CLARENCE J. ROBERTS,
Chief Justice of the Supreme Court of New Mexico.

169½ [Endorsed:] No. 1737. In the Supreme Court of New Mexico. The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, Appellees, vs. D. B. Smith and Gertrude W. Smith, his Wife, Appellants. Writ of Error. Filed in my office this Jun- 7 1915. José D. Sena, Clerk.

170 STATE OF NEW MEXICO,
Supreme Court, ss:

I, José D. Sena, Clerk of the said court, do hereby certify that there was lodged with me as such clerk on June 7th, 1915, in the matter of The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, vs. D. B. Smith, and Gertrude Smith, his wife.

1. The original bond of which a copy is herein set forth
2. Three copies of the writ of error, as herein set forth, one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Santa Fé, New Mexico, this —— ——.

[Seal Supreme Court, State of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

171 *Citation in Error.*

UNITED STATES OF AMERICA, *ss:*

To the Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of New Mexico, in Cause No. 1737 in said State Court wherein the Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger are appellees and D. B. Smith and his wife Gertrude W. Smith are appellants, and wherein a writ of error has been granted said appellants from the Supreme Court of the United States, to show cause, if any there be, why the judgment rendered against the said appellants, in said writ mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Clarence J. Roberts, Chief Justice of the Supreme Court of the State of New Mexico, this the 7th day of June, A. D. 1915.

CLARENCE J. ROBERTS,
Chief Justice of the Supreme Court of New Mexico.

[Seal Supreme Court, State of New Mexico.]

Attest:
JOSÉ D. SENA,
Clerk of the Supreme Court of New Mexico.

172 Service of the foregoing citation in error is hereby accepted and receipt of copy of citation for each defendant in error is hereby acknowledged, and further service of citation in error is hereby waived this the 9th day of June, 1915.

A. SEYMOUR THURMOND,
J. H. PAXTON,
R. L. YOUNG, AND
W. H. WINTER,
Attorneys for the Defendants in Error Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, Defendants in Error.

172½ [Endorsed:] No. 1737. In the Supreme Court of New Mexico. The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, Appellees, vs. D. B. Smith and Gertrude W. Smith, his Wife, Appellants. Citation in Error. Original. Filed in my office this Jun- 7 1915. José D. Sena, Clerk.

173 STATE OF NEW MEXICO,
Supreme Court, ss:

I, José D. Sena, Clerk of the Supreme Court of the State of New Mexico, do hereby certify that the original bond a copy of which is contained in the transcript, was lodged in this office on the seventh day of June, A. D., 1915, and that the original writ of error, which is attached to this transcript, and two copies thereof, one for each of the defendants in error, were lodged in this office on the seventh day of June, 1915, and that the original citation in error and acceptance of service thereof is attached to this transcript, which is a true transcript of the record of the within entitled cause, and

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of those parts of the record and proceedings called for in the præcipe in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of New Mexico, in the city of Santa Fe, this the 2nd day of August 1915.

[Seal Supreme Court, State of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

Endorsed on cover: File No. 24,872. New Mexico Supreme Court. Term No. 589. D. B. Smith and Gertrude W. Smith, plaintiffs in error, vs. Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger. Filed August 7th, 1915. File No. 24,872.

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 589. 214

D. B. SMITH AND GERTRUDE W. SMITH, PLAINTIFFS IN ERROR,

vs.

THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, AND F. P. ZOLLINGER.

IN ERROR TO THE SUPREME COURT OF NEW MEXICO.

BRIEF FOR PLAINTIFFS IN ERROR.

F. G. MORRIS,
W. D. Grant
Attorney for Plaintiffs in Error.

EL PASO PRINTING COMPANY.

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Supreme Court of the United States

OCTOBER TERM, 1916.

No. 589.

D. B. SMITH AND GERTRUDE W. SMITH, PLAINTIFFS IN ERROR,

vs.

THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, AND F. P. ZOLLINGER.

IN ERROR TO THE SUPREME COURT OF NEW MEXICO.

BRIEF FOR PLAINTIFF IN ERROR.

On the 11th day of May, 1909, the appellees, The Third National Exchange Bank of Sandusky, Ohio, and F. P. Zollinger, as Trustee, sued the appellants D. B. Smith and his wife, Gertrude W. Smith, to recover on three promissory notes, each for the sum of forty-five hundred dollars ($4,500) and interest and attorney's fees, which were executed by the appellant D. B. Smith to W. H. Reinhart for the purchase money agreed by appellants to be paid for certain tracts of land, and to foreclose a mortgage deed of trust executed by D. B. Smith and his wife, Gertrude W. Smith, to secure the payment of said notes, of even date with said notes, and conveying in trust to F. P. Zollinger the said tracts of land for the purchase price of which said notes were executed.

The defendants answered said complaint, pleading, among other things, illegality of the notes and deed of trust, in that the land sold by W. H. Reinhart to D. B. Smith for which the notes were executed, and to secure the payment of which D. B. Smith and wife executed the deed of trust sued on, was, at the time of said transaction, public land of the United States, and that exclusive possession, use and claim of ownership was taken and asserted by said Reinhart and transferred to said Smith, who accepted such exclusive possession, use and claim of said land, when, in fact, neither said Reinhart nor said Smith held the same under color of title *in good faith* or with a view to entering the same under the laws of the United States at the proper land office.

The plaintiff demurred to said plea of illegality, and the court having sustained such demurrer insofar as the plea applied to the deed of trust sought to be foreclosed, and the defendants not having asked leave to amend or having filed any amended answer, the court rendered judgment foreclosing the deed of trust sued on and ordering sale of land described therein to realize money to pay the amount due on said notes.

Defendants appealed from the judgment to the Supreme Court of New Mexico, and that court reversed the judgment of the court below and remanded the cause for a new trial. The case is reported in 17 N. M. 166-188 and in 125 Pac. 632.

On August 17, 1912, the mandate of the Appellate Court was filed in the court below.

Afterwards, on the 14th day of February, 1913, the defendants filed in the District Court their first amended answer, wherein they pleaded illegality, as before, and pleaded the facts intended to negative all *good faith* holding by said Reinhart and said defendant D. B. Smith of said public land, and also pleaded an estoppel on the part of said Reinhart and the plaintiff holders of the notes sued on to plead in this case a *good faith* holding of said land or of said notes, in that in the years 1891-3 in a suit brought by the Grant of the Colony of Refugio, a corporation, in the United States Court of Private Land Claims, wherein said corporation lawfully represented all the parties interested in said grant, and especially the remote grantor of plaintiffs, Leon Alvarez, who was named in the act of incorporation of said grant as a member thereof, there was a judgment rendered establishing the boundaries of said colony grant in such manner as to exclude therefrom the land described in said notes and in said deed of trust, whereby said land not being covered or claimed to be covered, by any other grant from any sovereignty of the soil, was shown to be public land of the United States; that no appeal was prosecuted from said judgment and the same became final and binding in said matters; of which decree the said Reinhart and D. B. Smith had knowledge when said Reinhart conveyed said land and delivered exclusive possession and use thereof to D. B. Smith and when D. B. Smith accepted the same and executed the notes and deed of trust sued on, and that the plaintiff Bank and F. P. Zollinger, trustee for said Bank, each at the time said notes were endorsed to them, had knowledge of said judgment and of the fact that said land was public land of the United States, and was not held under color of title *in good faith* or with a view to entering the same under laws of the United States, wherefore the Act of Congress of the United States of 1885 forbidding and penalizing occupancy of public land and the public policy

of said Act forbade any plea of *good faith* holding by those having knowledge of such adjudication.

The defendants further pleaded that there was no valuable consideration moving between said Reinhart and D. B. Smith and his wife, Gertrude W. Smith, to create any legal obligation on their part to pay said notes or to support said deed of trust as security, in that the said Reinhart had no title or right of possession in said land and could not vest said Smith with any rightful possession of said land, all of which was known to the plaintiff Bank when it accepted indorsement of said notes to it for value, for which want of consideration under the laws of Texas pleaded by defendants, where said notes were executed, and which were made payable in El Paso, Texas, they were unenforcible for want of a valuable consideration to support them.

Copies of the proceedings and judgment in the Court of Private Land Claims were made exhibits to the answer. The answer and exhibits forming a part of it may be found in the printed Record, pages 16 to 55.

The plaintiffs replied to said answer in the main without specific denials of the facts pleaded therein, but by denials of legal conclusions arising therefrom, and pleaded in avoidance of defendant's answer substantially as follows:

(1) Plaintiffs pleaded ownership of the land sold to Smith by Reinhart when he sold the same to Smith, and personal, exclusive, actual possession of the same, claiming the same under certain conveyances constituting color of title in good faith, and tracing the mesne conveyances from Leon Alvarez, a member of the said Refugio Colony Grant Corporation, through whom plaintiffs claim as do the defendants in their answer, wherein they plead plaintiff's claim of title through said Alvarez, and that he was named in the act of incorporation pleaded, as a member theref.

(2) Plaintiffs plead possession by Allen Potter under color of title prior to his conveyance to Reinhart, and good faith holding by Potter, and that Potter took legal advice as to said title of H. B. Holt, Esquire, an attorney at law of Las Cruces, New Mexico, who they alleged advised that the title said Potter was about to purchase was a good title, and that plaintiffs had knowledge of said opinion of said attorney and relied thereon in part in purchasing said notes and mortgage.

(3) Plaintiffs, without denying any of the facts pleaded by defendants as to the incorporation of the owners of said grant or as to the adjudication of said Court of Private Land

Claims that said land was public land of the United States, or as to knowledge of such adjudication by plaintiffs and W. H. Reinhart, deny the legal conclusion arising therefrom that it was public land, or that the possession thereof was unlawful, but say that if said land was public land of the United States of America, nevertheless said Reinhart's possession thereof was in *good faith*, under color of title such as is pleaded, from Leon Alvarez down to said W. H. Reinhart.

(4) Plaintiffs deny that said Reinhart, or any of his predecessors in the chain of title, was a party to said suit or judgment in the Court of Private Land Claims pleaded by defendants, or that any corporation having legal authority to represent grantors of said Reinhart was a party thereto, but there is no denial that such suit as defendant pleads was brought by the Corporation of Refugio Colony Grant or any denial of the existence of said corporation, or that the proceedings therein pleaded by defendants were had and judgment therein rendered as pleaded by defendants. Plaintiffs thus reduce the question to one of law as to whether or not the remote grantors of said Reinhart were bound by said judgment against said corporation having the legal authority to sue and to be sued in behalf of all the then owners of land in said colony grant. The plaintiff's replication may be found on pages 47 to 52 of the Record.

The defendants filed on July 31, 1913, a motion for judgment on the pleadings (Record 96-100), which motion was overruled and exception thereto saved (Record 53 to 55).

Afterwards, on June 30, 1913, the cause having been tried upon the pleadings and the evidence adduced by the respective parties, and motion for final judgment duly served coming on to be heard, the defendants moved the court to make certain findings of fact, excepted to certain findings of fact embraced in the final judgement proposed, moved for allowance of appeal and gave notice thereof and prayed for an order fixing the amount of the supersedeas bond to be given on appeal of this cause; whereupon, the court made its order adopting the findings of fact proposed by the defendants' counsel granting an appeal, and fixing the amount of the supersedeas bond to be given at five thousand dollars ($5,000) (Record 56 to 60).

The findings of fact by the trial court sustained the allegations of fact made by defendants in their answer.

The trial court rendered judgment for the plaintiffs and the defendants appealed to the Supreme Court of New Mexico assigning errors therein on all matters brought to this court for consideration. (Record 71.) The Supreme Court of New Mexi-

co affirmed the judgment of the court below. Its opinion is set out in the Transcript at pages 78 to 85 inclusive. The defendants have brought the case to this court by writ of error.

Assignment of Errors.

I.

The Supreme Court of New Mexico having found as facts that the land sold by W. H. Reinhart to plaintiff in error D. B. Smith, and in consideration of which sale D. B. Smith executed the notice and mortgages sued on, was public land of the United States and that the defendants in error in purchasing said notes knew that it was public land, and having found as facts that said Reinhart had by said sale attempted to vest in D. B. Smith exclusive claim and possession thereof under enclosure, and that said Smith as a part of said transaction accepted said exclusive possession and enclosure and set up exclusive claim to said public land, the court erred in holding as a matter of law, that said Reinhart, notwithstanding these facts and his knowledge that he had no title, might nevertheless have been holding said land in *good faith* at the time he sold the same to D. B. Smith and took back the mortgage thereon to secure the vendors' lien notes sued on herein, and that therefore the transaction and contract sued on was not shown to be illegal and unenforcible as an executory contract at the suit of the holders of said notes and mortgage which they acquired with full notice of the facts found by the court.

II.

The Supreme Court of New Mexico having found as facts that W. H. Reinhart and D. B. Smith knew that said Reinhart had no title to the land he sold to D. B. Smith at the time of the transaction in question between them in 1909, long after the judgment of the Court of Private Land Claims was rendered, which in effect adjudicated that said land was public land of the United States, the court erred in holding that said Reinhart could lawfully set up exclusive possession and claim of said land, in good faith, because of the fact that remote vendees in the chain of title under which he held had possessed the land under color of title and in good faith before the decision was rendered in the suit of the Corporation of Refugio vs. The United States, to which they were parties as incorporators of the Corporation which sued for them in the Court of Private

Land Claims; said good faith claim of said remote vendees having as a matter of law been extinguished by the adverse decree in that suit, so that neither they nor their vendees thereafter had any good faith claim which could have been passed by assignment to said Reinhart.

III.

The Supreme Court of New Mexico having found as facts that in the suit of the Corporation of Refugio vs. The United States in the Court of Private Land Claims, a decree was rendered that the land covered by the mortgage sued on herein was not a part of the Refugio Colony Grant and was therefore public land of the United States, and that said Reinhart and Smith were in privity with such decree and were bound by it, and had full knowledge of it, the court erred in not holding, as contended by appellants in that court, that it was the policy of the statute creating the Court of Private Land Claims to afford means of settling good faith claims then existing in claimants under Spanish and Mexican land grants by either sustaining the title of the claimants, or clearing up the title of the United States from the good faith claims of such claimants to the end that the further possession of such lands as were adjudicated to the United States might be protected from further exclusive claims and possession and enclosure of such claimants, or their assigns, after such adjudications were had at their instance or in a proper suit by the United States, and that it was against, not only the rule of *res adjudicata* but against the public policy of said Act creating the Court of Private Land Claims, and of the Act of February 25, 1885, rendering unlawful all exclusive claims and possession of public land not held in good faith, etc., to permit further holding or possession of public land by parties or privies to such judgments as were rendered and had become final, and in not holding that, therefore, the said Reinhart and the defendants in error who purchased said notes with knowledge of all these facts, were estopped to set up or claim that the holdings of said Reinhart were nevertheless in fact in good faith.

IV.

The Supreme Court of New Mexico having found the facts that the land for which these notes and mortgages sued on were executed, was public land of the United States when Reinhart attempted to make title thereto, and that there was no consideration, other than said land, to support the promise to pay

given in said notes (the improvements thereon being fixtures which become the property of the United States upon being placed on said land), the court erred in holding that the said notes were legal and enforcible and that the said mortgage, which was a mere incident or security for the notes, was legally enforcible, and in not holding that the defense of want of consideration to support the promise to pay, aside from the question of the illegality of the transaction, should be sustained; it being apparent from the findings of fact by the court that plaintiff in error has acquired nothing of value from defendants in error.

PROPOSITIONS, STATEMENTS AND ARGUMENT.

I.

Jurisdiction.

This court has jurisdiction of this Writ of Error because the defense of illegality of contract set up by defendants in their answer is made under and involves the construction and enforcement of the Act of Congress of February 25, 1885, entitled "An Act to Prevent Unlawful Occupancy of the Public Lands," 23 Stat. 321, and of the Act of Congress of March 3, 1891, entitled "An Act to Establish a Court of Private Land Claims, and to Provide for Settlement of Private Land Claims in Certain States and Territories," Chapt. 539, Sec. 4, 26 Statute, 856.

The defense pleaded was that the notes sued on and mortgage sought to be foreclosed were based upon an illegal consideration and were a part of an illegal transaction wherein the payee of the notes and the mortgage set up exclusive claim and possession of public land of the United States and delivered the same to the makers of said notes and the mortgagors without any color of title in good faith, in violation of said first mentioned statute, and an estoppel against plaintiff holder of the notes and mortgage to plead or rely upon such good faith as remote vendors in the chain of title may have had prior to the decision by the Court of Private Land Claims made in 1903, which in effect determined that said hitherto good faith claims were unfounded in a suit to which the payee of said notes was a privy through vendors who were parties by representation through a corporation formed to act as agent for all of the claimants under the Refugio Colony Grant in bringing and defending suits, of which facts defendants in error were fully advised when they took over the notes sued on.

Sage vs. Hampe, 235 U. S., 99-106;
Nut vs. Knut, 200 U. S., 12-22.

II.

Defense of Illegality if no Good Faith Possession.

If the possession of the public land in question was not held by Reinhart under color of title in good faith, the contract to deliver and the actual delivery of possession to Smith as the consideration for the execution of the notes and mortgage, the defense of illegality was perfect, and was such defense as plaintiff in error might make in the public interest notwithstanding their participancy in the illegality, and necessarily without returning the possession gained by the transaction as this would involve a further violation of law. The improvements such as ditches, fences and preparing land for cultivation being fixtures become the property of the United States, the owner of the soil, and hence no equities were established in the plaintiffs below.

Wasky v. Hammer, 222 U. S., 187;
Sage v. Hampe, 235 U. S., 99-106;
Schwanger v. Meabry, 59 Cal. 91;
Pullman Palace Car Co. v. Central Transportation Co., 171 U. S., 138.
Combs v. Miller, 103 Pac. (Okl.) 590;
McLaughlin v. Ardmore Loan & Trust Co., (Okl.) 95 Pac. 779;
Gorst v. Love, 55 Pac., 19;
Tandy v. Ellmore Copper Live Stock Co., 113 Mo. App., 409;
Shannan v. Eakin, 47 Ark., 351;
Langham v. Sankey, 55 Iowa, 52;
Brown v. First National Bank, 137 Ind., 137;
Reed v. Johnson, 27 Wash., 42;
Bank v. Smith, 17 New Mex., 166, the instant case on former appeal.

We adopt the opinion of the Supreme Court of New Mexico rendered in the instant case on former appeal to that court as our argument on all the foregoing propositions assuming the alleged illegal possession not to have been held in good faith; 17 New Mexico 166, printed in appendix to this brief.

III.

Question of Good Faith Possession.

The Supreme Court of New Mexico was bound to respect the findings of fact made by the court below in a trial without a jury as it would a special verdict of a jury. The Revised Statutes of New Mexico provides in Section 4197 as follows:

"Upon the trial of any question of fact by the court, its decision must be given in writing and filed with the clerk in the cause, and in such decision the court shall find the facts and give its conclusions of law pertinent to the case, which must be stated separately, but the finding of facts and the giving of conclusions of law may be waived by the several parties to the issue, by suffering default or by failing to appear at the trial, or by consent in writing, or by oral consent in open court, entered in the record. And upon the trial of any cause by the court, without a jury in common law cases, each party shall have the right to make all objections and take all exceptions that he might have made or taken, as if the trial had been before jury; and upon a review, by writ of error, in the Supreme Court, or by appeal, the said Supreme Court shall hear and determine the said cause in the same manner and with the same effect as if it had been tried before a jury."

And in Section 4507, it is provided as follows:

"The Supreme Court in appeals or writs of error shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to it shall seem agreeable to law, and said supreme court shall not decline to pass on any question of law or fact, which may appear in any record either upon the face of the record or in the bill of exceptions because the cause was tried by the court, or judge thereof, without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury."

The Supreme Court of New Mexico said it was not intended that the Supreme Court should pass upon the weight of the evidence introduced in the court below but upon the sufficiency of the facts as found to support the conclusion of law. The findings of the trial court rest on the same legal basis as would the verdict of the jury.

Pring vs. M. B. Goldberg Co., 15 N. M., 337; 107 Pac., 528.

The findings of fact made by the trial Judge so far as is material to the issue of good faith holding of possession of the public land were as follows:

"Third. That the consideration for the said promissory notes and deed of trust was the conveyance by the said W. H. Reinhart to the plaintiff D. B. Smith of the lands in plaintiffs' complaint described; and that the said lands were for many years, before and after the Mexican cession to the United States, in good faith considered to be a part of the Refugio Colony Grant, a Mexican Community Grant, and were so held in good faith by the owners of the said grant; and that the commissioners of the said grant, in good faith, allotted and conveyed the said lands to certain members of the said community who settled on the said grant; and that the titles and claims of the said allottees thereto were passed and deraigned by a chain of sufficient mesne conveyances to the said W. H. Reinhart; and that the said W. H. Reinhart and his predecessors in title and claim held, occupied and possessed the said lands for more than fifteen years, under and by virtue of the said conveyances from the commissioners of the Refugio Colony Grant and the said mesne conveyances; and that the said defendant D. B. Smith and his assigns now hold and possess, and are cultivating, the said lands, under and by virtue of the said conveyances from the commissioners of the Refugio Colony Grant, and the said mesne conveyances and the said conveyance from the said W. H. Reinhart to defendant D. B. Smith, and subsequent conveyances from defendant D. B. Smith to his said assigns."

Given.

"Fourth. That by the Act of March 7th, 1884, of the Legislative Assembly of New Mexico, the owners of lands within the limits of the Refugio Colony Grant in Dona Ana County, New Mexico, were constituted a body corporate and politic under the name and style of the Grant of the Colony of Refugio, under which they were authorized by said Act to sue and be sued and have perpetual succession; that the owners of lands in said grant thereafter and for many years prior to the bringing of the suit for confirmation of said grant, duly accepted said charter and duly organized and acted thereunder, and have ever since continued to do so; that afterwards, on to-wit, the 28th day of February, 1893, the said corporation and one William Dessauer filed their complaint and suit in the United States Court of Private Land Claims sitting in the city of Santa Fe, New Mexico, in and for said territory, reciting and entitling their suit as suing therein for themselves and in behalf of all others

who owned or claimed title to all or any portion of that certain private land grant called, or known as the Grant of the Colony of Refugio, situate in the county of Dona Ana and Territory of New Mexico, against the United States of America, under authority of the Act to establish a Court of Private Land Claims and providing for the settlement of private land claims in certain states and territories, and suing and praying for an inquiry into the validity of said grant, and that the lands embraced within the limits thereof be confirmed unto plaintiffs and other owners of said grant, alleging the limits of said grant to be such as to include therein the said tracts of land described in plaintiffs' mortgage or deed of trust, which is sued on herein; that proceedings were afterwards had in said cause, as pleaded by the defendants in their answer, and resulted in a final judgment, to-wit, 1903, establishing the validity of said grant and determining the boundaries thereof, which boundaries excluded the land involved in this suit as not being a part of said grant; that no appeal was prosecuted from said judgment, and, afterwards, as further pleaded by defendants, the cause proceeded to an official survey of said grant, the publication of notice of such survey and the approval thereof which was had and the report of same made to the proper authorities, resulting in the issuance of patent to said grant within the limits confirmed by said judgment, whereby the land described in the deed of trust herein was excluded from the boundaries of said grant as thus determined, and there was no other grant of said lands from the United States or under authority from any other form of government exercising jurisdiction over the said territory."

Given.

"Fifth. That at the time said complaint was filed instituting said suit, Leon Alvares, whose name is mentioned as one of the officers of said corporation, owned a claim of title to the lands in controversy which afterwards passed to W. H. Reinhart and D. B. Smith."

Given.

"Sixth. That said W. H. Reinhart at the time he sold and conveyed said land to D. B. Smith, knew that said proceedings had been had in said Court of Private Land Claims; and that plaintiffs had failed to sustain the allegation contained in their replication to the effect that H. B. Holt, an attorney at law of Las Cruces, New Mexico, reported in writing to one Allen Potter an opinion in substance to the effect the claim of title of one H. M. Maple to said lands constituted a good title thereto, or that any such opinion was delivered by said Potter to

said Reinhart; but the court finds that the said H. B. Holt wrote an opinion as to said title on an abstract submitted to him by said Allen Potter, which opinion was addressed to A. G. Foster, an attorney and abstractor of El Paso, Texas, employed by said Potter, which opinion has been read in evidence on the trial of this cause and forms a part of the record hereof, wherein the said Holt advised in substance, that the land in controversy was public land of the United States, and that plaintiffs, as pleaded in their replication, had knowledge of such opinion and of the facts therein stated and set forth prior to the time when the notes sued on herein were endorsed to the plaintiff bank."

Given.

"Seventh. That at the time the said W. H. Reinhart executed the deed of conveyance to D. B. Smith for which the notes sued on herein were executed, the said Reinhart was in the actual possession by enclosure of said land which he maintained, and was asserting a right to the exclusive use and occupancy thereof without other claim or color of title than that hereinabove stated, and not with a view to entry thereof at the proper land office under the general laws of the United States, which actual possession and enclosure was delivered to the said D. B. Smith as a part of the transaction under which the aforesaid notes and mortgage herein sued on were executed, in order that he might receive such exclusive possession and enclosure, and that the said D. B. Smith received such exclusive occupancy and claim as a part of said transaction, and thereafter asserted the same in his own behalf."

Given.

"Eighth. And the court further finds to be true those facts pleaded by either party which have not been specifically denied by the opposing party, and also those which have been made the subject of stipulations read into the record upon the trial of this cause and which form a part of such record, and which by reference thereto are made a part of this finding of facts."

Given.

By mistake the words "in good faith" were inserted in these findings so as to apply to the holding of said land after the decision of the Court of Private Land Claims and the court made an order correcting said findings after they had been filed "By striking from the third finding of fact, fourth line from the bottom of page two, after the words 'for more than fifteen years,' the words 'in good faith.' " The words "more

than fifteen years," referred to occur in printed transcript on page 58, in fifth line from the top of the page.

It thus appears that the trial court denied a finding of good faith holding as applied to the period following the decision of the Court of Private Land Claims that the land in question was not a part of the Refugio Colony Grant. The Supreme Court of New Mexico has nevertheless by a process of construction of the facts found by the trial court undertaken to decide as a matter of law that a good faith possession under color of title existed.

The question of law on which the decision here must be made we respectfully submit is, Did the Supreme Court of New Mexico, after having found in accordance with the findings below that Reinhart had no title and the land involved was public land of the United States and that Reinhart, through his vendors, was bound by the adjudication of the Court of Private Land Claims that the land in question was outside the boundaries of the Refugio Colony Grant, and that Reinhart knew he had no title, err in holding that he nevertheless was a holder in good faith? Is not this a contradiction in terms? What is meant by good faith if it does not necessarily include a belief that one has title? The view taken by the Supreme Court of New Mexico that one may know his title is questioned or denied and yet be a holder in good faith because he may nevertheless himself believe he had a title and the authorities cited in support of that contention we do not question. But the decision in the instant case goes further, and holds that though one knows he has no title he may nevertheless be a possessor in good faith, and yet the very essence of good faith as to title, as we understand it, is an actual belief founded on reasonable grounds that one had title. The fact that the good faith required relates to title and means a belief that one has title, is shown by the requirement of the statute that the occupant should hold under color of title. The statute must mean that the possession of public land in order to be excused by law must be under color of title, which the possessor believes and has good reason to believe is title.

The Supreme Court of New Mexico found as facts the former good faith holdings of remote vendors of Reinhart who possessed the land prior to the adverse decision on their title, and as to this we make no question until the Court of Private Land Claims decided and established the boundaries of the Refugio Colony Grant in a suit to which all of the owners were parties by representation through the corporation which they formed and endowed with authority to sue and to be sued in their behalf. But after that decision, from which there was no appeal,

the good faith claims hitherto existing as to lands determined by that decision to be outside the boundaries of the Colony Grant, were extinguished, and those in privity with that decision could not be heard to say they still had good faith claims, and could not be held by the United States to be in illegal possession of its lands. Such a contention renders the act establishing the Court of Private Land Claims and adjudication thereunder a useless farce. The very object and policy of the act was to afford a means of settling good faith claims either by sustaining the titles of claimants or deciding they had no title and no longer any reason to assert a good faith claim after the adjudication of a court of competent jurisdiction that they had no title.

The Supreme Court of New Mexico says in its opinion: "It is true he was fully conversant with all the facts regarding the status of his title. He knew that his lands were not within the confirmed portion of the Refugio Colony Grant. * * * * * * It is probably true that he as well as the other claimants were legally precluded from asserting title thereto as against the United States," etc. * * *

If he was conversant with all the facts he knew he had no title as against the United States, and the illegality consists solely in asserting title and exclusive possession against the United States. Plaintiffs in error do not claim any special merit of rights in themselves but rest their defense solely on the right of the United States, the public interest, in virtue of which they plead an illegality directed against not their rights, but which illegality is directed solely against rights of the United States. Hence it is apparent that the effort to distinguish between what might be the rights of the United States and the rights of plaintiffs in error has no rightful application to the case.

The Supreme Court of New Mexico attempts to write into the act of Congress exceptions to take cases out of the purview of the statute which we respectfully submit are unwarranted by the letter and spirit of the statute, and are not justified under any rules of construction of statutes. The statute made certain exceptions in favor of occupants of public lands, and no other exceptions can rightfully be read into it. To make exceptions based on the size or acreage involved or on the fact that improvements and settlements were made on the land after the court whose jurisdiction was invoked by the claimants themselves had finally decided against them, is to whittle away the statute. The very object and policy of the act establishing the Court of Private Land Claims was to settle good faith claims to Mexican Grants of land, and the tribunal which de-

cides that the adjudication of said court did not preclude litigants and their privies who were bound by the decision from remaining in possession and continuing to claim in good faith must run in the face of the public policy of the act creating the court and nullify the judgments of said court.

In the case of Deffeback v. Hawke, 115 U. S., 392, this court said:

"There can be no such thing as good faith where the party knows he has no title, and that under the law, which he is presumed to know, he can acquire none of his occupation.

"The doctrine of honest belief, even when the deed is tainted with no criminality in its origin, is subject to well defined limitations. The claimant must not only entertain an honest belief in the validity of his title, but must have some reasonable ground upon which to base such confidence." Citing numerous authorities.

In Center v. Cady, 184 Fed. 605, the Circuit Court of Appeals (Ninth Circuit) held that there could be no such thing as good faith holding by a person whose title had been adjudicated against him to be invalid.

In Vilas vs. Prince, 88 Fed. 682, the court denied the right to a claim of good faith holding by a person who knew the title under which he claimed had been held invalid by a court of competent jurisdiction, even though the claimant setting up good faith claim was not a party to the suit.

The case of Ramsey v. Wilson, 100 Pac. 177, is in point. In that case the court said of a claim which may have originated in good faith:

"If at that time in good faith they asserted a claim of right to file upon the land, that claim of right was early contested by the state, and the land department of the government rejected it in 1895. After that time the state brought an action in ejectment for other lands held the same as the lands in question. These appellants were directly interested in the result of that litigation, and actively defended that case. They were in substance parties to it, and bound by it." Citing authorities.

"The court finally in 1903 concluded the litigation by affirming title in the state. After the year 1895 there was clearly no claim of right made in good faith which could be the basis of an adverse holding by these appellants. The effect of that litigation was to determine that the appellants had no claim of right to the land, and, of course, after that time could not assert such claim in good faith."

That case is directly applicable to the instant case. It is not to be questioned that the original colonists, and their grantees, held the land described in the deed of trust in good faith, believing it was within the exterior of the Refugio Colony Grant, and through their agent, the corporation styled the Grant of the Colony of Refugio, they voluntarily went into court to establish the boundaries of said grant in such location as would include this land; but, upon full trial, a court of competent jurisdiction decided otherwise.

They had their remedy by appeal. They did not appeal from the decision. Consequently, the question was concluded, and this they knew. After that decision became final the law would not recognize any claim of right to occupy said land in good faith. To allow such a claim was to permit the claimant collaterally to impeach the solemn judgment of a court of competent jurisdiction, to claim against what they knew was the law of the land and to bring to naught the public policy inhering in the Court of Private Land Claims enactment, the leading policy of the Act being to set at rest good faith claims to land claimed by the government as public land, either by confirming such private claims or adjudicating that they were unfounded, and throwing the land under the protection of the laws of the United States which have been enacted to prevent unlawful, exclusive claim and use of public lands of the United States.

IV.

Defense of Lack of Consideration.

If this court should sustain the contention that Reinhart was a possessor in good faith under color of title, yet the judgment of the Supreme Court of New Mexico should be reversed on the undisputed facts pleaded and found to be true by both the trial and appellate courts in this: It is established by the findings of fact and law that Reinhart in fact had no title to the land he sold plaintiffs in error and for which they executed their notes and mortgage in question. It is decided now in this case again that said land is public land of the United States. It is, therefore, established by the decision in this case that the notes and mortgage were executed without consideration and are uninforcible in this proceeding in equity to foreclose the mortgage. It is clear under the decision made that whether the criminal law of 1885 was violated by Reinhart in his holding of possession or not, that the United States has the title to the land in question and may by civil suit of ejectment dispossess

plaintiffs in error at any time. The plaintiffs in error are liable in damages to the United States for rent values if any they reaped, and would not owe Reinhart for rents if such value they obtained. All improvements made by Reinhart on the land are fixtures and the water rights are appurtenant to the land or at all events are valueless to one not owning the land.

This is not a case in which the rule obtains that a vendee may not hold possession of land and defeat a recovery of the purchase money because of failure of title, but must return the possession in order to defeat a recovery on the purchase money notes. The Act of Congress of 1885 precludes a restoration of possession to Reinhart or his successors; for whatever question may be made as to the good faith of Reinhart at the time he sold to Smith, neither Reinhart nor plaintiff in error Smith could at the time of this trial pretend that a good faith possession might under the lights now before them be transferred by Smith to Reinhart. Plaintiff in error Smtih certainly does not pretend that he can now hold in good faith or transfer possession to Reinhart without violating the law against enclosure and assertion of exclusive claim to public land. Nothing of value could be re-conveyed and plaintiff in error has not received and does not hold anything of value from Reinhart or his successors. The right to make this defense because of lack of consideration without restoring the possession of the land arises under the Act of Congress of 1885, and hence the question is one of Federal cognizance.

In the case of Combs vs. Miller, 103 Pac. 590, the court said: "Dunn, J. February 7, 1908, J. H. Miller filed suit against Ed and Sarah Combs to recover judgment upon a promissory note dated September 17, 1903. Defendants filed answer as follows: 'Defendants state: That the supposed promissory note herein sued on in the petition mentioned was for the payment of the right to possession only of a certain tract of land lying and being in the Choctaw Nation, Indian Territory, more particularly described and known as the "Sim Casey" or the old "Jim Colbert place," the same being located about two miles north of old Goodland, Choctaw Nation, Indian Territory. That, at the time plaintiff sold defendants the right to possession to said tract of land, the plaintiff had no right, title or interest in and to said tract of land or to the possession thereof, but that the said tract belonged in common to the Chickasaw and Choctaw Tribes of Indians, and that the plaintiff was a trespasser on the right of the said tract of land, in that plaintiff, being a citizen of the Choctaw Nation and a member of the Choctaw Tribe of Indians and entitled to his pro rata allotment of lands, he at that time held more land in his possession

than he was by law allowed, and this particular tract of land was in excess of his share of allottable land and of his allotment; he then and there holding the same in violation of the law, as against these defendants, who are also members of the Choctaw Tribe of Indians.' To this a demurrer was filed by counsel for plaintiff, and sustained. Judgment was rendered in favor of plaintiff, and motion for new trial filed, overruled, and exception saved, and the case lodged in this court for review by petition in error and case-made.

"It is the insistence of counsel for defendants that the court erred in sustaining the demurrer to defendants' answer above set out. In our judgment this position is well taken. The principle involved in this case was passed upon by this court in the case of McLaughlin v. Ardmore Loan & Trust Co., delivered May 14, 1908, in an opinion prepared by Justice Turner (not yet officially reported), 95 Pac. 779. In discussing that case, which was likewas predicated upon a promissory note, the consideration of which was an excess holding of land belonging to the Choctaw Tribe of Indians, Justice Turner said: 'The question for us to determine is whether there appears in this transaction such a consideration as will support an express promise to pay. By virtue of the terms of Act of Congress July 1, 1902, c. 1362, Art. 19, 32 Stat. 643, ratified September 25, 1902, plaintiff in error lost the right of possession of the lands attempted to be conveyed to defendant in error, the price of which furnished the consideration of the note sued on. By that act such right of possession went back into the tribe by operation of law. It follows that at the time of this transaction the payee had nothing in these lands which he could convey to a citizen of the Choctaw Nation, much less a citizen of the United States, or to a corporation organized under its laws, such as is defendant in error. Turner v. Gilliland, 4 Ind. T. 606, 76 S. W. 253; Ikard v. Minter, 4 Ind. T. 214, 69 S. W. 852; Holford v. James, 4 Ind. T. 636, 76 S. W. 263.' "

In Texas, in the absence of a statute forbidding possession of public land of the state, the court in Lamb v. James, 87 Texas 485, 29 S. W. 647, held, as shown by the syllabus of the case on this point, as follows:

"The public lands are not a lawful subject of private contract, and an attempted conveyance thereof by one private person to another passes no interest whatever in the land, and does not create the relation of vendor and vendee, and therefore cannot be held to furnish a consideration for the promise of payment, or the securing of the supposed consideration of such conveyance."

And in Raynor Cattle Co. v. Bedford, 91 Texas 642, 44 S. W. 410; 45 S. W. 554, the court again said, as shown by the following syllabus:

"The ruling of the court in Lamb v. James, 87 Tex. 485, was upon one theory, not that a sale by private parties of vacant, unappropriated public domain was illegal as being against public policy, but that such sale furnished no consideration for the contract."

Upon the pleading of defendants, the finding of fact by the court that the land sold by Reinhart to Smith was public land of the United States, and the finding of fact that Reinhart and the plaintiff Bank knew this when their respective transactions were made, the defense of want of consideration for the notes sued on should have been sustained, entirely independently of the question of prior good faith holding of possession under color of title. Reinhart in fact had no title and conveyed none to defendant Smith, or anything of value. The improvements on the land are fixtures and belong to the United States and not to Reinhart or Smith. Defendant Smith did not acquire any right of possession through said conveyance. For such possession as he has held he is responsible to the government as his landlord, and not to Reinhart or plaintiff.

This question though raised by plaintiff in error in the trial court and in the Supreme Court of New Mexico, as shown by the statement preceding the opinion of that court was not treated in the written opinion of that court, but the defense was necessarily denied plaintiffs in error by the judgment of the state court affirming the judgment of the trial court.

Plaintiffs in error pray that the judgment of the Supreme Court of New Mexico be reversed and that the cause be remanded to the Supreme Court of New Mexico with instructions that that court reverse the judgment of the trial court and render judgment for plaintiffs in error on the special findings of fact made by the trial court.

F. G. MORRIS,
W. B. Grant
Counsel for Plaintiffs in Error.

APPENDIX.

The following is a copy of the opinion of the Supreme Court of New Mexico which was rendered on a former appeal in the instant case:

BANK VS. SMITH, 17 N. M., 175 TO 188.

OPINION OF THE COURT.

ROBERTS, C. J.—The appellants have assigned as error the action of the lower court in sustaining the demurrer to the answer, and entering judgment for the plaintiff as by default for want of a sufficient answer, claiming that the court thereby lent its aid to the enforcement of an executory contract of mortgage which the answer clearly showed was illegal, in that it was made in the course of, and as a part of a deed of sale and assertion of exclusive possession of vendor and vendee of public land of the United States in violation of the penal statutes and public policy of the United States, of which appellees had notice, being parties to said illegal transaction.

Appellees, in support of the judgment, contend, first: That the conveyance in question was not illegal, and second: That a grantee of land, though it be public land of the United States, cannot repudiate his purchase money mortgage of the land, by means of which he procured and acquired possession of the land, and at the same time withhold and retain the possession of the land so acquired.

The statute of the United States, which appellants contend the contract and transaction violates, is the Act of Feb. 25, 1885, ch. 149, 23 Stat. L. 321; 6 Fed., Stat. Ann. 533, the section of which reads as follows:

"Sec. 1. That all enclosures of any public lands in any state or territory of the United States, heretofore, or to be hereafter made, erected or constructed by any person, party, association or corporation, to any of which land included within the enclosure, the person, party, association or corporation, making or controlling the enclosure, had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such enclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erec-

tion, construction or control of any such enclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States, in any state or any of the territories of the United States, without claim, color of title or asserted right, as above specified as to enclosure, is likewise declared unlawful and hereby prohibited."

Section 2 makes it the duty of the various district attorneys of the United States to institute injunction suits to prevent violations of the act, and section 5 prescribes a penalty of a fine not exceeding $1,000 and imprisonment not exceeding one year for each offense.

It will be noted that the statute defines two offenses, each of which is punishable by fine and imprisonment. First, it is an offense for any person to enclose public lands of the United States in controvention of the statutes, and second, it is likewise an offense for any person to assert the right to the exclusive use and occupancy of any part of the public domain; the party in either event having no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office, under the general laws of the United States. If a person has claim or color of title made or acquired in good faith, or asserts a right to public land by or under claim made in good faith, with a view to entry thereof at the proper land office, etc., it is not an offense for him to either enclose public land or to assert the right to the exclusive use and occupancy of public land. The paragraph of the answer in question, alleges that Reinhart "had not claim or color of title made or acquired in good faith with a view to entry thereof at the proper land office of the United States * * * nor had he at any time theretofore any other claim or color of title made or acquired in good faith to said land," and that he asserted the right to the exclusive use and occupancy of the land described in the deed of trust, and had enclosed the same, and that the unlawful assertion of such right to the exclusive use and occupancy of said land was the inducement for the purchase by Smith, and that Reinhart undertook and agreed to deliver such exclusive occupancy of said land to Smith, thus showing that the assertion of the right to the exclusive use and occupancy of the land, which was in violation of the penal statute was a part of the consideration which entered into the consummation of the contract for the purchase of the land and the execution of the notes and trust deed. The demurrer, of course admitted the truth of the allegations of the answer, which were well pleaded, hence it is admitted that the land in question was

public land of the United States, to which Reinhart had not good faith, claim or color of title, and to which he had no asserted right with a view to entry, etc.; that he had enclosed the land; that he delivered to appellants the exclusive use and occupancy of said land, which said Reinhart then held, which delivery was made in pursuance of the contract to deliver such exclusive use and possession as a part of the transaction and attempted conveyance, and for which the notes and trust deed were executed. The allegations of the paragraph of answer clearly allege that the agreement to deliver the exclusive use and possession of the land, which Reinhart had theretofore asserted, to Smith, was a part of and entered into the consideration of the notes and trust deed.

The first question to be determined is whether the contract and conveyance was legal or illegal. Appellees rely chiefly upon the case of Tidwell vs. Chiricahua Cattle Co., (Ariz.) 53 Pac. 192, in support of their position that the conveyance in question was not illegal, but a careful reading of the case will show a distinction between the facts in that case and the one now under consideration. There the court says:

"The lands enclosed were not 'tracts of vast area of wild, unimproved lands of the public domain,' as contemplated by the act of congress, but a tract of less than 160 acres, all in cultivation, and actually used for agricultural purposes, and was held by the appellees not 'without claim or color of title' but by conveyances of record from grantors, under which appellee had for years held, occupied, plowed, seeded, irrigated, cultivated and improved it,' " and the court distinctly found that the defendant had shown color of title, thus bringing the case relied upon clearly without the prohibition and penalty of the statute in question; but here the allegations of the answer alleged that Reinhart did not have good faith, claim, asserted right, etc., or color of title. If issue should be joined upon the allegations of the answer and the proof should establish, as it did in the case of Tidwell vs. Chiricahua Cattle Co., that Reinhart held the land in good faith under conveyances, he would then bring himself clearly within the doctrine laid down, and his act would not be in contravention of the act of Congress in question.

The paragraph of the answer now under consideration alleges that Reinhart held the land without good faith, claim or color of title or asserted right, etc. Defense interposed here is that the consideration of the contract out of which the notes and trust deed originated, and which they were given to secure, was based upon the violation of a penal statute of the United States. We think the authorities uniformly hold that an act

done in violation of the statutory prohibition, is void and confers no right upon the wrongdoer. Reinhart had no right, under the law, to assert the right to the exclusive use and possession of government land, to which he had no claim or color of title, made or acquired in good faith, or asserted right thereto by or under claim made in good faith, with a view to entry thereof at the proper land office, etc., and in asserting such right he was acting in violation of law, and any conveyance or contract which he might make to any portion of the land to which he asserted such right, to the exclusive use and possession, and into which his assertion of such right to the exclusive use and possession entered, and by which he attempted to confer such right upon another party, was utterly void. Waskey vs. Hammer, 222 U. S. 187; Schwanger vs. Meabry, 59 Cal. 91; Coombs vs. Miller, (Okla.) 103 Pac., 590; McLaughlin vs. Ardmore Loan & Trust Co., (Okla.) 95 Pac. 779; Garst vs. Love, 55 Pac. 19; Tandy vs. Ellmore Copper Live Stock Comm. Co. 113 Mo. App. 409; Levison vs. Boas, 12 L. R. A., N. S. 575, and extended note.

We are aware that the rule above stated is subject to the qualification that when upon a survey of the statute, and from its subject matter and the mischief sought to be prevented, it appears that the legislature intended that the violation of the statutory prohibition should not render a contract void, effect must be given to that intention, but a survey of the statute in question fails to disclose any such intention. As was said by the Supreme Court of the United States in the case of Waskey vs. Hammer, supra, in considering a section of a statute of the United States prohibiting officers, clerks and employees of the general land office from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and providing that any person who violated the section should be forthwith removed from the office.

"The acts described in sec. 452 are expressly prohibited under the penalty of dismissal. There is in its language nothing indicating that its scope is to be confined to the exaction of that penalty, or that acts done in violation of it are to be valid against all but the government. Nor is there anything in its subject matter or in the mischief sought to be prevented which militates against the application of the general rule. On the contrary, it is reasonably inferable from the language of the section and the situation with which it deals, that it is intended that violations of it shall be attended by the ordinary consequences of unlawful acts."

In the case of Garst vs. Love, supra, the Supreme Court of Oklahoma held that a paragraph of answer interposed as a

defense to a suit to recover for the pasturage of cattle within an enclosure on government land, which stated that the enclosure was maintained upon government land, to which the plaintiff had no right or title, and of which they were holding exclusive possession for rental and speculation purposes in violation of the act of Congress of February 25, 1885, stated a good defense.

In the case of McLaughlin vs. Ardmore Loan & Trust Co., supra, the Supreme Court of Oklahoma, in a suit instituted on a promissory note, where the proof showed the consideration therefor to be a deed of land from the payee, to the payor in possession of the payee and held by him in violation of sec. 2118, R. S. U. S., which imposed a penalty upon a person making a settlement upon any lands belonging, secured or granted by a treaty with the United States to any Indian tribe, that there could be no recovery as the contract had for its object the violation of law and was illegal. The court says:

"The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein is void."

The paragraph of the answer in question alleging that Reinhart had the exclusive use and possession of the land in question, and that he transferred to the appellant the exclusive use and possession of the land, all without right or claimed right or color of title, and being designed to further the violation of the statute, and to aid and assist the appellant in continuing the violation thereof, under the rule announced in the above case, the contract would be clearly void and unenforcible. The assertion of the right to the exclusive use and possession of government land in violation of the statute, was a crime in itself, and where the notes and trust deed were grounded upon this violation, and the proposed continued violation by the appellant, Smith, it would hardly do to permit the party committing the offense to maintain an action upon obligations arising out of a criminal act.

The appellees contend, however, that even if the notes and trust deed are invalid, by reason of the facts above stated, the appellants are estopped to deny that Reinhart had title when he conveyed, or that the appellants had title when they executed the deed of trust, and that they are therefore estopped from setting up title in a third person. The appellees rely upon the doctrine laid down by Herman on Estoppels and Res Judicata, Vol. 2, secs. 910 and 911, that

"In a suit against a mortgagor for the land mortgaged he is estopped to deny that he had title when he mortgaged, or

to set up title in a stranger. * * * * The same principles of estoppel in pais apply in the case of mortgagors, and the rule that no man shall take advantage of his own wrong, is one of universal application," and numerous cases cited in support of the principle announced.

We concur fully in the above statement of the law, but do not think the principle applicable to this case. The appellant is not relying upon the fact that he had no title, or that Reinhart had no title except as such a fact or facts are incident to the main fact that the notes and trust deed are based upon a consideration growing out of a violation of a penal statute. It is the invalidity and unlawfulness of the transaction upon which the defense is based, and not the mere failure of title. It is a well-settled rule that a tenant cannot, during his possession of premises, dispute the title of his landlord under whom he entered, yet leases made in violation of the law, or which contemplate the doing of an act in violation of law and the settled public policy of the country are void. In the case of Dupas vs. Wassel, 1 Dill. 213, Judge Caldwell, in passing upon a lease executed to a portion of the "Hot Springs Reservation," which under an act of Congress was reserved for future disposal by the United States, and which under the act could not be entered, located or appropriated for any other purpose whatever, said:

"No rule is better settled than that tenant shall not, during his possession of premises, be permitted to dispute the title of his landlord, under whom he entered. And this rule extends to an under tenant * * * The plaintiff insists that applying these rules of law to the facts in this case he is entitled to judgment. Every agreement that parties may make does not in law, amount to a contract having a binding obligation. Contracts to do an illegal act, and contracts against good morals and public policy are void; and the law will not lend its aid to either party to such a contract to compel its performance or enforce any right claimed under it. * * * * A lease of premises for the purpose of prostitution or for any other immoral object, is a contract against good morals and absolutely void * * * and the same is true of leases that contemplate the doing of an act in violation of law and the settled public policy of the country. The lease in this case falls within the last category. * * * He had no right and could acquire no right to treat this government property as his own; and in attempting to do so, he was acting in violation of law; and any lease he may have granted to any portion of the reservation was utterly void."

There can be no estoppel against pleading illegality in the sense of penalized acts. This question was met by the Supreme

Court of Arkansas in Sherman vs. Eakin, 47 Ark., 351; I. S. W. 559, where some of the authorities are collated. The first paragraph of the syllabus of the case states the facts of the case as follows:

"The United States government is the original source of title to lands in Arkansas, and the presumption of the law is that the title remains with the government until some other disposition of it is shown and where a man sells land in that state, claiming to have derived it from the state upon swamp land grant, and at the same time, according to the books of the United States land office, the land was vacant, and subject to homestead entry under the federal laws, the presumption is that the grantor had no title, and a note given for the purchase money is void."

In the opinion of the court it is said:

"As a general rule, a purchaser entering into possession under his contract of purchase cannot, in an action like this, so long as he retains such possession, deny his vendor's title. If the vendor is unable to convey the title and he would rescind the contract, he must restore the possession. He cannot enjoy the property, and refuse to pay the price. The principle on which this rule rests is the purchaser is estopped to deny the title of his vendor. Because he acknowledged it and gained possession of his purchase, and he ought not in conscience as between them, to be allowed to enjoy the fruits of his contract and not pay the full consideration money. Lewis vs. Boskins, 27 Ark. 64; Galloway vs. Finley, 12 Pet. 294; Jackson vs. Ayers, 14 Johns, 223; Jackson vs. McGinness, 14 Pa. St. 333; McIndoe vs. Mormon, 26 Wis. 589. But this rule is not without exception. No one, as a rule, can estop himself from taking advantage of that which is contrary to public policy. Contracts, as a general rule, cannot vest in parties any rights in contravention of law or public policy. Mr. Parsons in his work on contracts, says: 'It is obvious, however, that the doctrine of estoppel can go no further than to preclude a party from denying that he has done that which he had power to do.' 2 Pars. Cont. (5th ed.) 799; Pub. Pol. 1115; Spare vs. Home Mut. Ins. Co., 15 Fed. Rep. 707; Steadman vs. Duhamel, 1 Man. G. & S. 888; Dupas vs. Wassel, 1 Dill, 213; Klenk vs. Knoble, 37 Ark. 304; Webb vs. Davis, Id. 555.

"The constitution of 1868 prohibited the encumbering of homesteads of residents of this state who are married men or heads of families, in any manner, while owned by them, except for taxes, laborers' and mechanics' liens and securities for the purchase money. In Klenk vs. Knoble and Webb vs. Davis,

supra, the defendants, while the constitution of 1868 was in force, executed mortgages, and recited or covenanted therein that the property mortgaged was not their homesteads. The court held, in both cases, which were actions to foreclose mortgages, that the mortgagor was not estopped from denying the truth of these recitals and covenants, and claiming the property as his homestead, because such recitals and covenants were contrary to public policy and void. As a rule, a tenant cannot dispute the title of his landlord. Yet, in Dupas vs. Wassell, supra, it was held that a landlord could not recover, against his lessee, ground rent for the use of the lands leased, because the lease was void by reason of its being contrary to the statutes of the United States, and against public policy; and that the lessee was not estopped to deny his landlord's title."

In Langan vs. Sankey, 55 Iowa 52; 7 N. W. 393, the court said of an estoppel pleaded to an illegal contract:

"It is conceded, as we understand, by counsel for the appellant, that an action could not be maintained to enforce the contract, and that Adye vs. Hanna, 47 Iowa, 264, is decisive as to this question. But it is insisted such a contract may be relied on as an estoppel, and a recovery, therefore, had. We do not believe this is correct, and are unwilling to hold that a contract void, as being against public policy, has any vitality whatever. It matters not how it may be pleaded, a substantial right cannot be enforced thereunder. That which cannot be recovered in an action on the contract should not be permitted to be done by indirection. Besides this, the defendant did not affirm any fact to be true which turned out to be false. At most, he asserted his legal opinion, and upon that the contract was based."

In Brown vs. First National Bank, 137 Ind. 655, 37 N. E. 158; 24 L. R. A. 206, the court said:

"The contention of counsel that appellee, having received the benefits of the contract, is estopped to defend against it on the principle that a corporation which has such benefit is estopped to assert that it had no power to contract, is unsound, as applied to the case at bar. The rule suggested applies to cases where private rights alone are concerned, while in contracts void as against public policy the public is interested. The public concern cannot be made a matter of private bargain. A number of maxims applied to interdict the enforcement of such a contract, and many decisions hold that the receipt of the benefits and retention of property under such a contract give no right of recovery. If the contract has not been executed, it will not be enforced; if it has not been executed, the law will not extend itself. It cannot be rendered valid by invoking

the doctrine of estoppel. Hutchins vs. Weldin, 114 Ind. 80; Perkins vs. Jones, 26 Ind. 499; Dumont vs. Dufore, 27 Ind. 263; Root vs. Stevenson, 24 Ind. 115; Wheeler vs. Wheeler, 5 Lans. 355; Snyder vs. Willey, 33 Mich. 483; Greenhood Pub. Pol. pp. 2, 3, 6, note 3; Broom Legal Maxims, p. 729-730; 7 Wait. Act. & Def. 92."

In Reed vs. Johnson, 27 Wash. 42, 67, Pac. 381, the court said: "The appellants are not estopped to raise the illegality of the contract because of their course of dealing with respondents under the contract. Validity cannot be given to an illegal contract through any principle of estoppel. Warvelle, Vendors, p. 162, 4; Durkee vs. People, ex rel. Askren, 155 Ill. 354, 40 N. E. 626; Brown vs. First National Bank, 137 Ind. 655; 24 L. R. A. 206; 37 N. E. 158; Pullman Palace Car Co. vs. Central Transportation Co., 171 U. S. 138; 43 L. Ed. 108; 18 Sup. Ct. Rep."

The case relied upon by the appellees merely go to the effect that in cases wherein no illegality arises but in which some legal defect of title may exist, which renders a deed or mortgage invalid because wanting in some legal requirement or formality, one claiming under a title is estopped to deny its validity, and one affirming a title by conveying or mortgaging is estopped to deny its validity in the absence of illegality. But illegality in the sense of acts forbidden and penalized by law may always be shown with or without pleading, and will be taken notice of by the court whenever it is made to appear in the case when waived by the parties.

The vice of appellees' contention consists in looking to the position of the defendant and in making the weakness of the defendant's position the point of decision, whereas the real question to be decided is not what the right of the defendant, who is not seeking relief, may be, but the question is, shall the court enforce at the instance of the plaintiff an illegal contract made in violation of a statute, which renders it criminal and declares a public policy against such transaction as the one brought to the attention of the court in this case was.

The plaintiff seeks affirmative relief and seeks relief upon the very contract, which is illegal and not otherwise than upon the contract. The question is not what the defendant may plead, but what relief can the plaintiff have on the contract if the facts brought to the attention of the court by the answer be true.

Appellees insist however, that equity, in the enforcement of a superior public policy, will apply the doctrine of estoppel, contended for by the appellees, to preclude the appellants from

setting up the illegality of the transaction of which they seek to take advantage, and will wink at the malum prohibitum of Reinhart's conveyance, in order to prevent the malum in se of the defendants' attempted fraud. Appellees rely chiefly upon the case of Brooks vs. Martin, 2 Wall. 70, in support of the proposition, and attempt to apply in this case the principles of that case, holding that an accounting may be had and enforced of the proceeds of an illegal partnership. This case has, however, been criticized, and the general statements made in the opinion have been repudiated in most of the American cases, and it has been limited by the United States Supreme Court to the very facts of that case in McMullen vs. Hoffman, 174 U. S. 639. But the facts of that case and the one now before the court are altogether different; there the illegal contract had been fully executed, and the plaintiff was not relying upon the illegal contract and was not seeking to enforce it, but in the case now before the court, as disclosed by the answer, the plaintiff is seeking to enforce the illegal contract. This mortgage contract and the notes are executory, and this action is brought in a court of justice to enforce, what the answer shows to be a part of an illegal transaction and the question is, not as to the rights or standing of the appellant, but is, will the court enforce at the instance of the appellees an illegal contract? It might be that the appellees could allege such a state of facts in reply, as would render it unjust and inequitable to permit appellant to take advantage of the illegality of the transaction, a matter however, which we do not decide, but from the present state of the pleadings, nothing appears necessitating the application of the rule contended for by appellees. From all that appears, Reinhart, without good faith, claim, color of title, or asserted right, took possession of government land, asserted thereto the right to the exclusive use and possession, enclosed it with a fence, and sold it to appellant, and agreed to deliver and did deliver to appellant, Smith, the exclusive use and possession of said land and the enclosures thereon.

It is true that the recitals in the deed to Smith say that the land was obtained by conveyance, but the answer alleges that Reinhart did not hold the land under color of title, made or acquired in good faith, or claim or asserted right, made in good faith, and if these allegations are true, and they must be taken as true, upon demurrer, no equities are shown to exist in favor of Reinhart, which require a departure from the rule announced in the case of McMullen vs. Hoffman, supra, that

"No court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract

in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract."

The appellees contend that it would be inequitable to permit appellant to retain possession of the land, acquired by the contract even if it is illegal, and that they should not be permitted to plead the illegality of the contract and still retain possession of the land. It is true that the defense interposed in this case is a dishonest defense, and it lies ill in the mouth of the defendants to allege it. But it is not out of any consideration for the defendants that the courts permit such a defense to be interposed, but it is allowed for public considerations and in order to better secure the public against dishonest transactions, McMullen vs. Hoffman, supra. As said by the Supreme Court of the United States in Pullman Palace Car Co. vs. Central Transportation Co., 171 U. S. 138, in speaking of the holding of the courts in regard to illegal contracts:

"They are substantially unanimous in expressing the view that in no way and in no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of a desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon principles of public policy already noted."

As the appellees seek a recovery upon the alleged illegal contract, and not upon a disaffirmance thereof, equity can extend to them no relief.

Being of the opinion that the answer properly alleges that the notes and trust deed were founded upon a contract, which was illegal, in that its consideration was grounded upon the violation of a penal and prohibitory statute of the United States, and that it stated a good defense, it follows that the trial court erred in sustaining the demurrer thereto. The cause is therefore reversed with instructions to the lower court to overrule the demurrer and to permit a reply to be filed thereto by appellees and to proceed with the case in accordance with this opinion.

IN THE

Supreme Court, United States

OCTOBER TERM, A. D. 1916

No. [redacted] 214

D. B. SMITH AND GERTRUDE W. SMITH, PLAINTIFFS IN ERROR

vs.

THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, AND F. P. ZOLLINGER.

BRIEF FOR DEFENDANTS IN ERROR

A. SEYMOUR THURMOND and
W. H. WINTER,
Both of El Paso, Texas, and
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Both of Las Cruces, New Mexico,
Attorneys for Defendants in Error.

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IN THE
Supreme Court, United States

OCTOBER TERM, A. D. 1916

No. 589.

D. B. SMITH AND GERTRUDE W. SMITH, PLAINTIFFS IN ERROR

vs.

THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, AND F. P. ZOLLINGER

DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF THE NATURE AND RESULT OF THE SUIT

For a statement of the nature and result of the suit we present that portion of the "Statement of Facts" as found by the State Supreme Court, shown on pages eighty-one (81) and and eighty-two (82) of the Transcript of Record, beginning near middle of page eighty-one (81) and including all on page eighty-two (82) as follows:

"The facts out of which this litigation arose, may be briefly "stated as follows:

"In 1850 the government of Mexico granted certain lands "now embraced within the limits of Dona Ana County, this "state, to the Colony of Refugio. The Grant was similar to "many others found in this state. Settlements were made "upon it by many people, and individual allotments were "made from time to time by the commissioners.

"The territorial legislature, by the Act of March 7th, 1884, "constituted the owners of lands within the limits of the grant "a body corporate and politic under the name and style of "the Grant of the Colony of Refugio, under which they were "authorized by said act to sue and be sued and have perpetual "succession.

"Many years ago the lands involved in this litigation, em-"bracing some 400 acres were allotted to ten individuals, who "subsequently, by separate deeds of conveyance, transferred "the same to Leon Alvarez, probably some time in the 80's,

"but the date is wholly immaterial. From that time to 1909 "various deeds were executed to divers parties, all of whom "had possession and cultivated and improved the land. Some- "thing like six or seven thousand dollars, possibly more, hav- "ing been expended in improvements on the land and in con- "structing irrigation ditches. In 1909 W. H. Reinhart "claimed to be the owner of the lands, under deeds of con- "veyance, and was in possession of the same. In that year "he conveyed the same to D. B. Smith, the appellant here, "receiving perhaps one-half of the purchase money in cash, "and to secure the balance took Smith's promissory notes, "secured by a mortgage on the real estate. The notes aggre- "gated $13,500.00. It is not disputed that Reinhart was the "owner of said lands if the original allottees were invested "with the legal title to the same.

"Some time prior to 1893, the grant was surveyed by Elkins "& Marmon, and the lands in question here were within the "limits of that survey. In 1893, the commissioners of the "grant, acting under the power and authority conferred by "the Acts of March 7, 1884 instituted proceedings in the "United States Court of Private Land Claims to have the "title of said grant confirmed and settled. Leon Alvarez "was one of the Commissioners of the grant at that time and "acting as such. The title of the grant was confirmed and a "survey was ordered to determine what lands were embraced "within the limits of the same. This survey was made by "the Surveyor General of New Mexico and reported to the "Court, and the title to the lands so embraced within the "limits of such survey was confirmed in the Colony of "Refugio. This survey, so made as aforesaid, embraced a "smaller tract than did the Elkins & Marmon survey, and "the land in question here, together with other lands, was "without the limits of the survey, made under the direction "and by authority of the Court of Private Land Claims. "The judgment of the Court of Private Land Claims estab- "lishing the boundaries and confirming the title to the "lands within the limits of such survey, so made by the "surveyor general of New Mexico, was entered in the year "1903, and from which no appeal was taken.

"The parties owning land without the limits of the grant "as confirmed, but within the Elkins & Marmon survey con- "tinued in possession thereof and resided thereon with their "families, and dealt with said lands as though they had been "invested with the legal title to the same. No action was "ever taken by the United States, so far as the record dis- "closes, to dispossess them, although the legal title to said "lands was in the United States. In 1909, when the deed to

"Smith was executed by Reinhart a bill was pending before "Congress to validate the titles of the bona fide claimants "to said lands, so found to be without the limits of the con- "firmed survey.

"The notes and mortgage securing the same, executed by "Smith were transferred by Reinhart to the appellee some "time in the year 1909 for value. All parties concerned were "fully advised as to the condition of the title to the lands "involved.

"Smith refused to pay the notes when they became due, "and this suit was instituted by the bank to recover thereon "and for foreclosure of the mortgage.

"From the judgment for the amount called for by the "notes, and foreclosing the deed of trust appellants prose- "cute this appeal.

"The Honorable trial judge, among the other findings of "fact, made the following finding, which finding of fact "was adopted by the State Supreme Court: 'that said lands "were for many years, before and after the Mexican cession "of the United States, in good faith considered to be a part "of the Refugio Colony Grant, a Mexican Community Grant, "and were so held in good faith, by the owners of the said "grant; and that the commissioners of the said grant, in "good faith, allotted and conveyed the said lands to cer- "tain numbers of said community who settled on the said "grant; and that the titles and claims of the allottees there- "to were passed and deraigned by a chain of sufficient "mesne conveyances to the said W. H. Reinhart; and that "said W. H. Reinhart and his predecessors in title and "claim held, occupied and possessed the said lands for more "than fifteen years, under and by virtue of the conveyances "from the commissioners of the Refugio Colony Grant and "the mesne conveyances; and that the said defendant D. B. "Smith and his assigns now hold and possess and are culti- "vating the said lands under and by virtue of the said con- "veyances from the commissioners of the Refugio Colony "Grant, and the said mesne conveyances, and the said con- "veyances from the said W. H. Reinhart to defendant D. B. "Smith and his said assigns.'

"Defendants in error, plaintiffs below, 'filed their reply "to defendant's amended answer, alleging among other "replies, that Reinhart was, at the time he conveyed to "appellant D. B. Smith, in actual possession of the land, and "claiming the same in good faith under deeds and mesne "conveyances and under color of title theretofore acquired "in good faith and for value,' and then proceed to set out "with particularity the several deeds and conveyances under

"which Reinhart claimed the land, commencing with a deed "from one Allen Potter to him, Reinhart, of date January "25th, 1909, and running back to a number of deeds from "the commissioners of the Colony of Refugio to the various "grantees of said Colony under whom he, Reinhart, claimed "title, the deeds from said commissions of said colony to "their immediate grantors all being dated in and about the "year 1888, some three years prior to the Act of Congress "creating the Court of Private Land Claims, 'and Plaintiffs "say that each and all of said deeds constituted a valid claim "and color of title to said lands; and that under the same "the respective grantees acquired, and thereafter, until the "same had been conveyed by deed to their respective grantees, "as above stated, asserted claim to said lands hereinbefore "described, which deeds constitute his claim and color of "title thereto.'

"Plaintiffs in the 'third' paragraph of their reply, "denied that Reinhart or any of his predecessors in title "were in any wise parties to the suit and judgment rendered "therein before the Court of Private Land Claims, and de- "nied that he or any of his predecessors in title were in any- "wise bound by the judgment.

"Plaintiffs in Error admitted the execution of the obliga- "tions, (three promissory notes in the principal sum of "Forty-five Hundred Dollars ($4500.00) each sued upon, "'And the defendants further allege that the sole and "only consideration moving defendant D. B. Smith to make "or execute said notes, or any of them, was a conveyance and "deed in writing, duly executed, acknowledged and delivered "by the payee of said notes, W. H. Reinhart, wherein said "Reinhart pretended to convey to the defendant D. B. Smith "the lands described in said deed in trust herein sued on.

"'That certain personal property was also conveyed by "said deed and fully paid for by the cash payment made by "the defendant Smith of $9,500.00, which more than paid "for said personal property and in part paid for said land, "and the notes sued on as appears from their terms were "executed for the remaining purchase money, which the de- "fendant D. B. Smith agreed to pay for said land, and for no "other consideration.

"'Plaintiffs in error have continued in possession of the "land since the date of deed from Reinhart to them, May 11th, "1909, and still are possessing and enjoying the same. "Smith, the appellant, testified on the witness stand that he, "or his grantees, were now in possession of the land, claim- "ing to own it. While thus holding possession and enjoying "the benefits of the property he obtained from Reinhart, and

"refusing to restore to him the title and possession of the "same, he seeks to avoid liability for the balance due.' See "concluding paragraph, Transcript of Record Page 85 "Opinion of the Court.

"Plaintiffs in error admitted upon the trial that, 'upon "the trial it was, by stipulation, agreed that the plaintiffs "have such deed of conveyance from the Refugio Colony "grant owners and mesne chain of conveyances down to W. "H. Reinhart and W. B. Smith and wife as they plead in their "reply and such as defendants plead that they hold under.' " (See second paragraph Transcript of Record page eighty-one.)

Defendants in error, in reply to the answer of plaintiffs in error set out, with particularity, a chain of deeds by which, beginning with deeds from the Commissioners of the Grant to various persons, and from said grantees of the Commissioners of the Grant through a regular chain of transfers down to W. H. Reinhart. See Transcript of Record page forty-eight.

"The said W. H. Reinhart and his predecessors in title and "claim held, occupied and possessed the said lands for more "than fifteen years under and by virtue of the said convey-"ances from the Commissioners of the Refugio Colony Grant "and the said mesne conveyances; and that the said defend-"ant and his assigns now hold and possess, and are cultivat-"ing the said lands under and by virtue of the said convey-"ances from the commissioners of the Refugio Colony Grant, "and the said mesne conveyances, and the said conveyance "from the said W. H. Reinhart to defendant D. B. Smith and "subsequent conveyances from defendant W. B. Smith to his "said assigns. See Transcript of Record page 58, fourth line "to end of paragraph.

"In 1909, when the deed to Smith, (Plaintiff in Error) "was executed by Reinhart a bill was pending before Con-"gress to validate the titles of the bona fide claimants to "said lands, so found to be without the limits of the confirmed "survey."

See Transcript of Record page 82, thirteenth line from bottom of page.

The trial court found that Reinhart held the land under color of title acquired in good faith and gave judgment for plaintiffs, (defendants in error) for the sum of Thirteen Thousand Five Hundred Dollars ($13,500.00) principal of the three notes sued upon, Six Thousand Two Hundred and ninety-one Dollars and three cents ($6,291.03) accrued interest, fifteen hundred dollars ($1500.00) attorney's fees, and thirty-six Dollars and five cents ($36.05) as costs of

suit, the judgment aggregating Twenty-one Thousand Three Hundred and Twenty-seven Dollars and eight cents ($21,-327.08). See Transcript of Record bottom of page 61 and top of page 62.

The judgment was affirmed by the State Supreme Court. Transcript of Record page 83 to 85. See Transcript of Record page 78 to 85 inclusive setting out in full the statement of the case and opinion rendered. The case is reported in 148 Pacific Reporter at page 572.

"Plaintiffs in error, claiming the right to remove said "judgment to the Supreme Court of the United States by "Writ of Error under Section No. 237 of the Judicial Code "of the United States, because the appellants in said cause "claimed a right and immunity from the liabilities sought "to be enforced in said cause against them, under a statute "of the United States, which defense was especially set up "and claimed by appellants as a defense to said suit both in "the said Third Judicial District Court by appropriate "answer and pleading filed in due time therein, and in the "Supreme Court of the State of New Mexico; in due time "and by the appropriate procedure in said court, on said "appeal, prior to the rendition of judgment therein, in this, "to wit:

"That in the trial court these defendants pleaded in their "answer in bar of this suit that the notes for payment of "which the mortgage therein pleaded was sought to be fore-"closed and said mortgage was executed as a part of a certain "illegal transaction and contract wherein one R. H. Rein-"hart being in exclusive possession under inclosure of public "land of the United States, and asserting exclusive claim "of ownership of certain public land of the United States "sold and vested in appellant, D. B. Smith, such exclusive "possession and claim of said public land under said in-"closure, which possession said D. B. Smith in said trans-"action accepted and set up exclusive claim of possession and "ownership thereunder, and executed said notes and mort-"gage to secure the payment of said notes as a part of said "illegal transaction and without other consideration than "said sale and vestiture of said Smith with said ex-"clusive possession and exclusive claim to said public "land under said enclosure, which exclusive occupancy "under enclosure and assertion of exclusive claim there-"to by said Reinhart and appellant, D. B. Smith, was "without any good faith, claim or color of title made or "acquired by either of them in good faith, or asserted right "thereto by or under claim made in good faith with a view "to entry thereof at the proper land office under the General

"Laws of the United States at the time of said possession and "asserted right, and that said contract and transaction were "made in violation of an Act of Congress entitled: 'An Act "to Prevent Unlawful Occupancy of the Public Lands,' "(23 Stat. 321, Compiled Laws of U. S. Sec. 2427, passed "Feb. 25, 1885) as appears by the record of the proceedings "in said cause."

See Petition for writ of Error, Transcript of Record pages 89 and 90.

Statement and Argument.

Plaintiffs in Error insist that, "This court has jurisdiction of this Writ of Error because the defense of illegality of contract set up by defendants in their answer is made under and involves the construction and enforcement of the Act of Congress of February 25, 1885, entitled "An Act to Prevent Unlawful Occupancy of the Public Lands," 23 Stat. 321, and of the Act of Congress of March 3, 1891, entitled "An Act to Establish a Court of Private Land Claims, and to Provide for settlement of Private Land Claims in Certain States and Territories," Chapt. 539, Sec. 4, 26 Statute, 856. See Brief of Plaintiffs in Error p. 7 paragraph following word "Jurisdiction."

Defendants in Error submit that this Honorable Supreme Court is without jurisdiction, and submit as a proposition counter to the first of plaintiffs' in error "Propositions, Statements and Argument," p. 7 of their brief, the following:

The Honorable Supreme Court of the United States has not jurisdiction to review the judgment of the State Supreme Court.

First Counter Proposition.

Writ of Error from the judgment of the Supreme Court of the State to the Supreme Court of the United States in this case does not lie, except the plaintiffs in error have been denied a "title, right, privilege, or immunity" claimed by them under the Statute, (Act of Congress of February 25, 1885 entitled "An Act to prevent Unlawful Occupancy of Public Lands" 23 Stat. 321, Compiled Laws of U. S. Sec. 2427). See Petition for Writ of Error, Tr. of R. pp. 89 and 90.

Second Proposition

The plea of plaintiffs in error that they, as also their vendor, were holding, cultivating and occupying land, the legal or true title to which was in the United States, did not set up

any title, right, privilege or immunity claimed by plaintiffs in error under the Statute or Act of Congress pleaded.

Statement, Argument and Authorities in Support of Contention of Defendants in Error

Plaintiffs in error nowhere assert or plead that they were entitled to any title, right, privilege or immunity under the statute.

To the contrary plaintiffs in error plead that the lands, or rather the possession then held thereof by Reinhart, were conveyed to and the conveyance and possession thereof accepted by plaintiffs in error, who then and there executed the obligations sued upon in payment therefor, in violation of the Act of Congress of February 25, 1885. See Tr. of R., third par. of "Answer," pp. 17 and 18. Not because of anything in the Statute declaring such conveyance to be void but for the sole and only reason that the grantor of plaintiffs in error, had taken possession, enclosed, improved, cultivated and made an exclusive use of the property in derogation to an Act of Congress, under which plaintiffs in error claimed nothing and admit that they had no right to claim anything.

The claim, or plea, of plaintiffs in error is: that defendants in error were precluded or estopped from asserting a right by reason of the said Statute. Plaintiffs in error did not themselves, as must be the case in order to inject a Federal question into the case, the decision of which is or was necessary to a proper disposition of the case, claim any title, right, privilege or immunity under the Act of Congress.

Conde & Streeter vs. York & Starkweather, 168 U. S., 642, 18 Sup. Ct. Rep. 234, was a case, the facts of which were, in brief, that certain contractors, Witherley & Gaffney, had contracted with the Government to construct certain buildings at Sackett's Harbor, N. Y. The contractors became indebted to defendants in error, York & Starkweather, for material used in the construction, and assigned to said York & Starkweather Three Thousand Dollars ($3,000.00) of moneys to become due and payable by the Government. Subsequently the contractors executed to Conde & Streeter, plaintiffs in error, "an Agreement by which they promised to pay off and discharge, from the money to be received by them from the Government, certain notes indorsed by Conde & Streeter and certain individual indebtedness held by them against Witherley & Gaffney."

The contractors, Witherley & Gaffney, received from the disbursing agent of the Government a draft for $4400.00 which they turned over to Conde & Streeter, but before Conde

& Streeter received said draft they had notice of the execution of the assignment by the contractors to York & Starkweather of $3,000.00 of the moneys to become due to said contractors. York & Starkweather brought suit against Conde & Streeter in the Supreme Court of New York for the County of Jefferson, and Conde & Streeter set up, as one of their defenses, that the pretended assignment by the contractors to York & Starkweather was void and in contravention of Sec. 3477 of the Revised Statutes of the United States, prohibiting and declaring void "all transfers and assignments made of any "claim against the United States, or of any part or share "thereof or interest therein," etc., for the reason that said assignment was executed before the claim of the assignors had been allowed.

The New York courts found in favor of Conde & Streeter, and York & Starkweather sued out writ of error to the U. S. Supreme Court.

The writ of error was dismissed for want of jurisdiction, the court, through Chief Justice Fuller, saying:

"In order to give this court jurisdiction to review the judg- "ment of a State Court against a title or right set up or claimed "under a statute of, or an authority exercised under, the "United States, that title or right must be a title or right of "the plaintiff in error, and not of a third person only; and the "statute or authority must be directly in issue.

"In this case the controversy was merely as to which of the "claimants had the superior equity in the fund. The statute "was only collaterally involved, and plaintiffs in error as- "serted no right to the money based upon it."

In Conde et al. vs. York et al., supra, Chief Justice Fuller cites, in his opinion and with approval, Walworth vs. Kneeland, 15 How., 348, as follows: "In Walworth vs. Kneeland, "15 How., 348, it was ruled, where a case was decided in a "State Court against a party who was ordered to convey cer- "tain land, and he brought the case up to this court, on the "ground that the contract for the conveyance of the land was "contrary to the laws of the United States, that this was not "enough to give jurisdiction to this court under the twenty- "fifth Section of the judiciary act. The State Court decided "against him on the ground that the opposite party was inno- "cent of all design to contravene the laws of the United "States.' Mr. Chief Justice Taney, however, said: "But if "it had been otherwise, and the State Court had committed so "gross an error as to say that a contract forbidden by an act "of Congress, or against its policy, was not fraudulent and "void, and that it might be enforced in a court of justice, it "would not follow that this writ of error could be maintained.

"In order to bring himself within the twenty-fifth Section of "the Act of 1789, he must show that he claimed some right— "some interest—which the law recognizes and protects and "which was denied to him in the State Court." The writ of error was dismissed.

We submit that the record in the present case would have fully sustained the Supreme Court of New Mexico in a finding and that in affirming the judgment that Court did, effectually, find, that the vendors of plaintiffs in error, were "innocent of all design to contravene the laws of the United States."

Defendants in error, in their "Reply" to the "Answer" of plaintiffs in error alleged, "among other replies," that Reinhart was, at the time he conveyed to appellant D. B. Smith, in actual possession of the land "and claiming the same in good "faith under deeds and mesne conveyances and under color of "title acquired in good faith and for value," "and then pro- "ceeded to set out with particularity the several deeds and "conveyances under which Reinhart claimed the land, com- "mencing with a deed from one Allen Potter to him Rein- "hart, of date January 25th, 1909, and running back to a num- "ber of deeds from the commissioners of the colony of Refu- "gio to the various grantees of said colony under whom he, "Reinhart, claimed title, the deeds from said commissioners of "said colony to their immediate grantors, (should read grant- "ees), all being dated in or about the year 1888, some three "years prior to the Act of Congress creating the court of Pri- "vate Land Claims."

'And plaintiffs say that each and all of said deeds con- 'stituted a valid claim and color of title to said lands, and that 'under the same the respective grantees acquired, and there- 'after, until the same had been conveyed by deed to their res- 'pective grantees, as above stated, asserted claim to said lands 'hereinbefore described, which deeds constitute his claim and 'color of title thereto.'

"Plaintiffs in the 'third' paragraph of their reply, denied "that Reinhart or any of his predecessors in title were in any "wise parties to the suit and judgment rendered therein be- "fore the Court of Private Land Claims, and denied that he "or any of his predecessors in title were, in any wise, bound "by the judgment." See "Statement of the Facts," by the State Supreme Court, Tr. of R., p. 80, 2nd and 3rd paragraphs.

Upon the trial in the trial (District) court, "Upon motion "and request of defendant, (plaintiffs in error), the trial "judge made and filed certain findings of fact. Among other "findings of fact are, 'Third:' 'and that said lands were for 'many years, before and after the Mexican cession of (to) 'the United States, in good faith considered to be a part of the

'Refugio Colony Grant, a Mexican Community Grant, and 'were so held in good faith, by the owners of the said grant; 'and that the commissioners of the said grant, in good faith, 'allotted and conveyed the said lands to certain numbers, '(members), of said community who settled on said grant; and 'that the titles and claims of the allottees thereto were passed 'and deraigned by a chain of mesne conveyances to the said 'W. H. Reinhart, and that said W. H. Reinhart and his prede-'cessors in title and claim held, occupied and possessed the said 'lands for more than fifteen years, under and by virtue of the 'conveyances from the commissioners of the Refugio Colony 'Grant, and the said mesne conveyances, and the said convey-'ances from the said W. H. Reinhart to defendant D. B. 'Smith, and subsequent conveyances from D. B. Smith to his 'said assigns.'

"Upon the trial it was, by stipulation, agreed that:

'The plaintiffs have such deed of conveyance from the Re-'fugio Colony Grant owners and mesne chain of conveyances 'down to W. H. Reinhart and D. B. Smith and wife as they 'plead in their reply and such as defendants plead that they 'hold under.'

"During the examination of a witness for plaintiffs, Dionicio Alvarez, counsel for defendant, made the following 'admission:'

'It is admitted by the defendants, for the purpose of short-'ening the testimony, that the parties mentioned in the chain 'of transfers from the Refugio Colony down to the date of the 'rendition of the decree of the Court of Private Land Claims in 'evidence were holders under the chain of title mentioned, in 'good faith, under color of title and in good faith.'

See "Statement of the Facts" by the State Supreme Court, Tr. of R., pp. 80 and 81, bottom of page 80 down to middle of page 81.

"In 1909, when the deed to Smith was executed by Reinhart, "a bill was pending before Congress to validate the titles of "bona fide claimants to said lands, so found to be without the "limits of the confirmed survey." See "Statement of the Facts" by the State Sup. Ct., Tr. of R., p. 82, last four lines of 4th to last paragraph. See also The Third National Exchange Bank of Sandusky, Ohio, et al., appellees vs. D. B. Smith, et ux., appellants, reported in Pac. Rep., Vol. 148, p. 512 at p. 514, affirming the judgment, and we respectfully refer to the authorities there cited.

In Hale vs. Gaines, et als, 22nd How., 144. "A contest, (says Mr. Justice Catron, by whom the opinion was written), for the ownership of the Hot Springs, in Arkansas," * * * * * * one party deraigning title through a pre-emption claim, as an

occupant under the Acts of Congress of 1830 and 1832, "and the other by the location of a New Madrid warrant on the same land," in which the claimant under the New Madrid warrant, who was defendant in the trial court, questioned the validity of plaintiff's pre-emption entry "because the land it covers was "not subject to entry by an occupant claimant, or any one else, "after the Act of April 20th, 1832, had reserved it from sale."

The court said: "Moreover, the plaintiff in error, (defend- "ant below), is not in a condition to draw in question the valid- "ity of Belding's entry. He relies on an outstanding title in "the United States to defeat the action. Being a trespasser, "without title in himself, he cannot be heard to set up such "title." 'To give jurisdiction to this court, the party must 'claim for himself, and not for a third person, in whose title he 'has no interest.' Henderson vs. Tennessee, 10 How., 323. "The plaintiff in error must claim (for himself), some title, "right, privilege, or exemption, under an Act of Congress, &c., "and the decision must be against his claim, to give this court "jurisdiction. Setting up a title in the United States, by way "of defense, is not claiming a personal interest affecting the "subject of litigation."

In Wynn vs. Morris, 20 How., 3, Mr. Justice Catron, delivering the opinion, the United States Supreme Court, said:

"The complainant filed his bill in a State circuit court in "Arkansas, to enjoin Morris from executing a writ of posses- "sion founded on a recovery by an action of ejectment for the "northwest quarter of section 18, in Township 16, south of "Red River.

"Wynn alleges that the whole of the quarter section was "cultivated by him, and had been for years before the inception "of Morris's title, and that he, Wynn, claimed title to the land "through the State of Arkansas, and that Morris had obtained "a legal title in fraud of Wynn's superior right in equity.

"Morris claims through Keziah Taylor. In 1829 and in "1830 when the occupant law of that year passed, she was a "widow, and cultivated a small farm on the land in dispute; "she sold out her possessions there in the latter part of 1830, "left the country secretly, and settled permanently in the Mexi- "can province of Coahuila and Texas, and there she remained "without returning to Arkansas until December, 1842, when "she made her appearance, proved her cultivation in 1829, "and her continuing possession in May, 1830, in the form pre- "scribed by the act of that year, had her pre-emption allowed, "entered the land, and sold it to Morris. She got a patent in "1844.

"The reason why Mrs. Taylor did not enter the land at an "earlier day was, that the township No. 16 was not surveyed

"until 1841, and within one year before the date of her entry.

"Wynn seeks a decree on the ground that Morris procured "Mrs. Taylor to enter the land for Morris' benefit, when she "had no right of pre-emption, because of the abandonment of "her possession for more than ten years.

"The register and receiver held that a preference of entry "was vested by the act of 1830, and they refused to investigate "the fact of abandonment. This opinion was concurred in "by the commissioner of the general land office. And, to cor- "rect this alleged error, the bill was filed. The State circuit "court refused the relief prayed; adjudged that Mrs. Taylor "obtained a valid title to the land, and decreed damages against "Wynn for detaining possession. From this decree he ap- "pealed to the Supreme Court of Arkansas, where the decree "of the circuit court was affirmed, and to that decree Wynn "prosecutes his writ of error out of this court; and the first "question here is, whether we have jurisdiction to re-examine "and reverse or affirm the decree of the State courts. This "can only be done in a case where is drawn in question the con- "struction of a statute of the United States, &c., and the de- "cision is against the title set up or claimed under the statute "by the losing party. If Wynn had no title, of course he could "not claim under a law of the United States, and cannot come "here under the 25th section of the judiciary act of 1789, merely "to draw in question the decree which dismissed his bill.

"To this effect are the cases of Owings vs. Norwood's less- "ees, (5 Cr., 344;) Henderson v. Tennessee, (10 How., 311).

"Wynn sets up a pretension of claim to the land in dispute "through the State of Arkansas, which State was authorized "to locate 500,000 acres of land by acts of congress passed in "1841 and 1842; and the complainant insists that he had made "a contract with the State, through her locating agent, Charles "E. Moore, who was acting under instructions from the gov- "ernor of said State, to the effect that he, the complainant, "should be allowed to purchase the land from the State at two "dollars per acre. But the State did not locate this quarter "section, nor had it an interest in it at any time; so that the "title was outstanding in the United States till Keziah Taylor "made her entry.

"The complainant Wynn, having no interest in the land "but a naked possession, not protected by an act of congress, "we order that his writ of error be dismissed for want of "jurisdiction."

Plaintiffs in error admit that they make no claim of title, right, privilege or immunity under the Acts of Congress of Feby. 25th, 1885.

On page 14 of their brief, at the middle of the page, beginning in 4th line of the paragraph, counsel for plaintiff in error says: "Plaintiffs in error do not claim any special "right or merit in themselves, but rest their defense solely "on the right of the United States, the public interest, in "virtue of which they plead an illegality directed against not "their rights, but which illegality is directed solely against "the rights of the United States."

In view of the fact that this record discloses that plaintiff in error is endeavoring to obtain judicial assistance to aid him in escaping the payment of some, at this time, twenty or more thousand dollars which he contracted to pay for the property, we think we may be pardoned the expression of some skepticism as to the sincerity of his solicitude in behalf of "the public interest" and to protect "the right of the United States." We are disposed rather to agree with the Supreme Court of New Mexico, "that the defense interposed in this "case is a dishonest defense, and it lies ill in the mouth of "defendant to interpose it." See 8th to 10th lines, p. 30 of brief of plaintiffs in error, also 17 N. M. 175, Bank vs Smith.

As said in Hale vs Gaines, supra,

"Setting up title in the United States is not claiming a "personal interest affecting the subject of litigation."

Plaintiffs in error, in support of their proposition and insistance that this Honorable Supreme Court of the United States has jurisdiction to review the judgment of the State Sup. Ct. cite, as authority, Sags vs. Hampe, 235 U. S. p. 99-106, and Nutt vs. Knut 200 U. S. p. 12-22.

We submit that the rule announced in Sage vs Hampe, is based upon very dissimilar facts and conditions to the present case. In that case, Sage vs. Hampe, plaintiff sued to recover of defendant damages for failure of defendant to perform a contract to convey to plaintiff "Indian land" which did not belong to defendant, but "had been allotted and "patented to the Pothawatamie Tribe under the Act of "Congress of February 8th, 1887, chap. 119, 24th Stat. at L. "388 Comp. Stat. 1913 Secs. 4195-4210, and by Sec. 5 of "that Act any conveyance or contract touching such land "within twenty-five years from the date of the allotment "and trust patent was made null and void, and it is alleged "that the period had not expired and had not been abrogated "at the date of the contract." Defendant, (plaintiff in error Sage), in his answer plead the inhibition of the Statute and nullity of the contract.

"The defendant relied upon the Act of Congress as a de- "fense and is entitled to come to this court." See first para-

graph and first three lines of second paragraph of opinion rendered by Mr. Justice Holmes.

One can not and ought not to be required to perform or be required to pay damages for failure to perform a contract which at the time made was expressly declared by statute to be void.

Sage brought himself clearly within the statute authorizing the writ of error, for the reason that he was denied immunity from the performance of a contract which the law denounced as void, and which law he invoked as relieving him from performance or to pay damages for failure to perform.

If Sage had performed Hampe would have acquired nothing by the void conveyance. It is difficult to understand how Hampe would be entitled to damages for failure of Sage to perform a contract the performance of which would have been a nullity and have conferred nothing of value. We submit that there is a marked difference between that case and the present one.

Nutt vs Knut, 200 U. S. 12, cited by plaintiff in error, was a case in which one James W. Denver, an attorney, had made a written contract with the Executrix of Haller Nutt, deceased, to collect a claim against the United States "for property of "which the said Haller Nutt and his estate was deprived by "the acts of officers, soldiers and employees of the United "States in Louisiana and Mississippi in the years 1863, 1864 "and 1865, amounting to One Million dollars, more or less."

The contract assigned to the attorney, Denver, "33 1-3 "per cent of the amount which may be allowed on said "claim," and made the contingent fee a lien "upon said "claim and upon any draft, money, or evidence of indebted-"ness which may be issued thereon."

See 2nd paragraph of opinion by Mr. Justice Harlan.

The planintiff, defendant in error, Knut, "succeeded to all "of the rights, whatever they were, of Denver under the "above contract." See first four lines 4th paragraph of opinion.

Knut sued in the chancery court of Adams County Mississippi, "the defendants being the administrator, heirs and devisees of Haller Nutt, deceased." See first paragraph of opinion.

Mr. Justice Harlan, in pronouncing the opinion and judgment of the Supreme Court, said, in part, as follows: "The "first question is one of jurisdiction of this court. The "present plaintiffs in error based their defense in part upon "Sec. 3477 of the Revised Statutes (U. S. Comp. Stat. 1901, "p. 2320,) which declares null and void certain transfers and "assignments of claims against the United States. They in-

"sisted that the contract sued on was in violation of that "statute; and they were protected by its provisions against "any judgment whatever in favor of the plaintiff.

"In every substantial sense, therefore, they asserted a "right and immunity under a statute of the United States, "and such right and immunity was denied to them by the "Supreme Court of Mississippi."

We submit that neither the opinion in Sage vs Hampe or Nutt vs. Knut, supra, in any wise departs from the well established and repeatedly announced doctrine, that in order to confer jurisdiction on the Supreme Court of the United States to review the judgment of the State Supreme Court, plaintiff in error must have been deprived of some title, right, privilege or immunity guaranteed or granted to him under the particular statute invoked, and in the present case the plaintiff in error tells the court, on p. 14, of brief, middle of the page, that "Plaintiffs in error do not claim any special "merit of right in themselves but rest their defense solely on "the right of the United States, the public interest, in virtue "of which they plead an illegality directed against not their "rights, but which illegality is directed solely against the "United States."

For the reasons above stated and under the authorities cited we respectfully submit that the writ of error should be dismissed for want of jurisdiction, and pray that it be so ordered.

Introductory Statement Upon The Merits of The Case.

In event this Honorable Supreme Court of the United States shall entertain jurisdiction, then it is respectfully insisted that upon the law and facts as disclosed in the record, the judgment of the Supreme Court of the State of New Mexico was consistent with justice and the equities of the case and should be affirmed.

Statement, Argument and Authorities.

The five assignments of error set forth on pages 5 and 6 of the brief of plaintiffs in error all attack the judgment of the State court upon the one general proposition that the court erred in refusing to hold that the notes and deed of trust executed to secure their payment, were void for the reason that Reinhart, the payee, was not possessed of the property and claiming the same in good faith and under color of title.

It is practically admitted by plaintiffs in error, in the second point or proposition advanced on page 8 of their

brief, that if the possession of the land in question was held by Reinhart under color or title in good faith, then, in such case, the contract is enforceable and the judgment of the State court should be affirmed.

Color of Title.

For more than half a century, since the early case of Wright vs Mattison, 18th How. 50, 15th L. Ed 280, color of title, as defined therein, has been recognized. As said by Mr. Justice Daniel in announcing the opinion of the Court:

"The courts have concurred, it is believed, without an "exception, in defining 'color of title' to be that which in ap- "pearance is title, but which in reality is no title. They "have generally concurred in attaching no exclusive or "peculiar character or importance to the ground of the in- "validity of an apparent or colorable title; the inquiry has "been whether there was an apparent or colorable title, un- "der which an entry or claim has been made in good faith."

Statement.

It is not contended by plaintiffs in error that the deeds and mesne conveyances from the commissioners of the Refugio Colony Grant to the several members and allottees of the colony, who conveyed to Leon Alvarez, who conveyed to his wife Felicitas Alvarez, who conveyed to her nine children, who conveyed to H. M. Maple, who conveyed to Allen Potter, who conveyed to W. H. Reinhart, who conveyed to plaintiff in error D. B. Smith did not apparently and colorably convey title.

Plaintiffs in error, at the trial admitted that "The plain- "tiffs have such deed of conveyance from the Refugio Colony "Grant owners and mesne chain of conveyances down "to W. H. Reinhart and D. B. Smith and wife as they plead "in their reply, and such as defendants plead that they hold "under."

See Tr. of R. p. 70 "Second" paragraph.

Plaintiffs plead, in their reply, at length and with particularity a consecutive chain of title, beginning with deeds passed in or about the year 1888 from the commissioners of the Grant down to W. H. Reinhart the vendor of plaintiff in error D. B. Smith. See Tr. of R. "Reply" beginning with "Second" paragraph on p. 47, foot of page and ending on p. 49 top of page. See also "Statement of the Facts" by the New Mexico Sup. Ct. Tr. of R. p. 80 2nd par. 6th line.

Plaintiff in error, D. B. Smith, was fully advised at the time he bought as to the condition of the title. "All parties "concerned were fully advised as to the condition of the title "to the lands involved." See 3rd to last paragraph, "State-"ment of the Facts" Tr. of R. p. 82.

STATEMENT AND ARGUMENT CONTRA THE CONTENTION OF PLAINTIFFS IN ERROR THAT HOLDING OF REINHART WAS NOT UNDER COLOR OF TITLE MADE OR ACQUIRED "IN GOOD FAITH."

What is color of title is matter of law, what is good faith in making claim under such title is a matter of fact.

In Wright vs Mattison, supra, the trial judge was requested by defendant to instruct the jury as follows:

"That the questions whether the deed given in evidence "was made in good faith, and whether the defendant has oc-"cupied the said land under said deed in good faith, are ques-"tions of fact which must be decided by the jury upon con-"sideration of all the facts and circumstances given in evi-"dence upon the trial in this cause."

The court refused to give the requested instruction, except with the following qualification, namely: "That this, "as a general proposition, is true, but as a matter of law, the "court charges the jury, that any man who is in possession "of land claiming to be the owner thereof, and who permits "the land to be sold for non-payment of taxes, and who him-"self becomes the purchaser, and acquires a deed under such "purchase, such title cannot be said, within the meaning of "the law to be made in good faith."

To the refusal to give the requested charge, and to the qualification added by the trial judge defendant excepted.

Mr. Justice Daniel, in reversing the judgment and remanding the case, said:

"We hold, that in assuming to decide upon the question of "good faith on the part of the defendant, the court exerted "an authority not legitimately belonging to it; a power ex-"clusively appertaining to the jury."

Woodward vs Blanchard, 16 Ill. 433.

This case was tried without a jury.

Under Sec. 4197 of the Revised Statutes of New Mexico, (copied into the brief of plaintiffs in error on p. 9, top of page) it is provided that, "Upon the trial of any cause by

"the court, without a jury in common law cases, each party "shall have the right to make all objections and take all ex- "ceptions that he might have made or taken, as if the trial "had been before a jury; and upon a review, by writ of error, "in the Supreme Court, or by appeal, the Supreme Court "shall hear and determine the said cause in the same man- "ner and with the same effect as if it had been tried before "a jury."

Argument on Question of "Good Faith."

Defendants in error, in the trial court pleaded color of title, entry and holding thereunder in good faith.

The trial court, in rendering judgment for defendants in error, necessarily found, from the facts and circumstances in evidence and so adjudged that Reinhart entered into possession of the land and held under color of title acquired in good faith.

The Supreme Court of the State, to which court the facts and circumstances in evidence were presented, in affirming the judgment necessarily found that the facts and circumstances were sufficient to warrant the trial court, sitting as a jury, in the judgment rendered, which judgment could only be rightly rendered, in the first instance and sustained by the State Supreme Court upon the assumption that Reinhart's title was acquired in good faith.

In the judgment entry, (See "Final Judgment" pp. 60 to 65, Tr. of R. on p. 61, 3rd paragraph of the final judgment, there appears this recital, beginning in the 13th line of said 3rd paragraph, "and that said W. H. Reinhart and his pre- "decessors in title and claim, held, occupied, used, cultivated, "improved and possessed the said lands for more than fif- "teen years, in good faith, under and by virtue of the said "conveyances, etc."

In the "Statement of the Facts" as found and set forth in the opinion rendered by the State Supreme Court, and shown in the Tr. of the R. pp. 78 to 82, particularly on page 82, 3rd and 4th paragraphs from bottom of page, the State Supreme Court found the facts and circumstances in evidence to warrant that court in expressing itself as follows:

"The parties owning land without the limits of the Grant "as confirmed, but within the Elkins & Marmon Survey con- "tinued in possession thereof and resided thereon with their "families, and dealt with said lands as though they had been "invested with the legal title to the same. No action was "ever taken by the United States, so far as the record dis- "closes to disposses them, although the legal title to said

"land was in the United States. In 1909, when the deed to "Smith was executed by Reinhart, a bill was pending before "Congress to validate the titles of the bona fide claimants "to said lands, so found to be without the limits of the con- "firmed survey."

These recitals of the conclusion of fact deducible and which the state supreme court did deduce from the facts and circumstances in evidence, were, we respectfully submit, amply sufficient to warrant that court holding, in affirming the judgment of the trial court, that Reinhart held under claim and color of title made and acquired in good faith, and that his assigns, defendants in error, were entitled to be protected against the loss of their money while his, Reinhart's, venders and their assigns, continued and still continue to enjoy the fruits and revenues of the property, in payment for which plaintiffs in error had executed the obligations sued upon. See third finding of fact by trial court, Tr. of R. pp. 57 and 58.

Statement and Argument.

In reply to IV point or proposition of plaintiffs in error urging "Defense of Lack of Consideration."

On page 16 of the brief for plaintiffs in error they urge a "defense of lack of consideration," in that Reinhart not having the legal title to the land conveyed to Smith, the purchase money notes given by Smith were without consideration.

The point or proposition advanced does not present a federal question, even if the defense were tenable under the facts and circumstances of the case.

The state supreme court found, as a fact, that "all parties "concerned were fully advised as to the condition of the title "to the lands involved." Tr. of R. p. 80, last sentence of third paragraph from bottom of page.

Plaintiffs in error "were fully advised" and knew just what they were buying and contracting to pay for. Since they bought congress has passed an act whereby the assigns of plaintiffs in error may possibly have, or in all probability will acquire the legal title to the land, under their purchase and acquisition of such title as Reinhart and those under whom he claimed held. See act of congress, February 3rd, 1911, U. S. Stat. at L. Vol. 36, p. 896, Chap. 35, entitled "An "Act to Quiet Title to Certain Lands in Dona Ana County, "New Mexico."

It is not pretended (nor could it have been, for it was not a fact) that Reinhart in any wise warranted the title against all claimants or against the United States. It is probable,

in view of the fact that no pretension is made that Reinhart warranted the title to the property, that his deed to Smith was probably only a quit claim or, what is more likely, a special warranty warranting the title only against claimants under him, Reinhart.

In either case the plea of failure of consideration would be without merit.

STATEMENT AND ARGUMENT CONTRA CLAIM OF PLAINTIFFS IN ERROR, THAT TRIAL COURT REFUSED TO FIND THAT REINHART ACQUIRED AND HELD THE LAND "IN GOOD FAITH."

On page 12, last paragraph of the brief for plaintiffs in error, appears a statement to the effect that by mistake the words "in good faith" were inserted in the third finding of fact by the trial court and afterwards were stricken out.

Counsel endeavors to construe the action of the trial court in striking out the words "in good faith" into a refusal of the court to find that Reinhart held under color of title acquired "in good faith." See 1st paragraph, p. 13 of brief for plaintiffs in error.

This Honorable Supreme Court of the United States can be little concerned as regards the reason or reasons why these words were stricken from the finding of fact, especially in view of the final judgment rendered and wherein the recital is made and the trial court adjudged "that the said W. H. "Reinhart and his predecessors in title and claim held, oc- "cupied, used, cultivated, improved and possessed the said "lands for more than fifteen years, in good faith," etc. See "Final Judgment" Tr. of R. p. 61, 3rd paragraph 13th to 16th lines.

It is sufficient answer to say that the record wholly fails to show any finding that Reinhart held in bad faith or not in good faith.

It is not to be doubted but that, if the Honorable trial Court could have been persuaded that Reinhart held in bad faith, plaintiffs in error would not have overlooked the incorporation of such finding into the record.

STATEMENT, ARGUMENT AND AUTHORITIES, AS TO APPLICATION OF ACT OF CONGRESS OF FEB'Y. 25th, 1885.

We submit the construction placed upon the Act of Congress of February 25th, 1885, by this Honorable Court in the case of of Cameron vs the United States, reported in the 148 U. S. at p. 301.

That case, was in many respects, very similar to this, about the only difference being that in that case the United States sued, under said Act of February 25th, 1885, to compel Cameron to remove his fences erected by him enclosing land claimed by the United States, through their representative, said land being within the exterior limits of a Mexican Grant, as claimed by Cameron, but without the limits of the grant as the same had been surveyed by the Surveyor general of Arizona "who had reported it to be a valid grant, and "recommended that it be confirmed to the representatives "of Romero and his associates to the extent of four square "leagues, but defendant, Cameron, claimed that it should be "confirmed to the exterior boundaries thereof, as set forth "and described in the original expediente.

The court in construing the Act of Congress said: "The "law was, however, never intended to operate upon persons "who had taken possession under a bona fide claim or color "of title; nor was it intended that, in a proceeding to abate "a fence erected in good faith, the legal validity of the de- "fendant's title should be put in issue. It is sufficient de- "fense to such a proceeding to show that the lands enclosed "were not public lands of the United States, or that de- "fendant had claim or color of title, made or acquired in good "faith. * * * * * * as the question whether the lands "enclosed by the defendant in this case were public lands of "the United States depends upon the question whether he "had claim or color of title to them, the two questions may be "properly consiedred together."

This Supreme Court then held in the Cameron case, supra, that the judgment of the Supreme Court ordering the removal of the fence, or its destruction, be reversed and to dismiss the petition.

We respectfully submit that under the above interpretation of the statute, the contract between Reinhart and Smith was not affected or rendered illegal by reason of said statute.

Criticism of Authorities Cited by Plaintiffs in Error.

Waskey vs. Hammer, 222 U. S. 187, is not in point. In that case one Whittren located mineral land, but at the time of making such location he was a United States Mineral Surveyor, and the court held that under the United States Revised Statutes, Sec. 452, U. S. Compiled Stat. 1901, p. 257, he, Whittren, being an employee of the General Land Office, was prohibited from making the location and thereby acquiring title.

Pullman Palace Car Company vs. Central Transportation Company, 171 U. S., 138, involved no question of illegality of contract as affected by any prohibitive statute, but did involve the question of validity of a lease contract from plaintiff in error to defendant in error, by reason of the doctrine of "ultra vires."

Combs vs. Miller, 103 Pac., 590, is a case in which the court refused to enforce a contract to pay purchase money for lands that "belonged in common to the Chickasaw and Choctaw "tribe of Indians." The vendor held only the possession and that possession under the law was illegal and forbidden by law. (Secs. 19 and 21, C. 1362, 32 Stat., 643, Act of July the 1st, 1902.)

If Reinhart's possession was in contravention of the Act of February 25th, 1885, invoked by appellants on this as well as on the former appeal, then Combs vs. Miller, supra, is in point, otherwise it is not.

McLaughlin vs. Ardmore Loan & Trust Co., 95 Pac., 779, was a case in which the Supreme Court held that a sale of Indian land was void under the Act of Congress, July 1st, 1902, C. 1362, Sec. 19, 32 Stat. 643, as also under Sec. 2118, U. S. Revised Stat., penalizing settlement on lands belonging, secured or granted by treaty with the United States to any Indian tribe.

Garst vs. Love, 55 Pac., 19, was a case in which 170,000 acres of Government land had been enclosed within a pasture by defendants in error, without claim or color of title. The court held that Love could not be made to pay a note given for pasturing cattle in said pasture, for the reason that the enclosure of the land was in violation of the Act of February 25th, 1885, the question of claim or color of title made or acquired in good faith was not in the case at all. The case was one of those instances of fencing in vast acres of public domain which Congress sought to punish and prevent by the Act of February 25th, 1885.

Tandy vs. Ellmore Copper Live Stock Co., 113 Mo., App. 409, is exactly the same character of case as that of Gorst or

Garst vs. Love, supra. The suit was to recover for pasturing cattle on 240 Sections of Government land.

In Shannan vs. Eakin, 47 Ark., 351, it appears, from the statement given of the case, that "Fleming Burke was in pos-"session of the land in question, and sold it to John W. Eakin, "on credit, for the sum of $666.66," for which Eakin executed his promissory note, Burke agreeing to convey upon payment of the note. Burke "claimed the land" through one John Skidmore and others upon a swamp-land grant from the State of Arkansas, and at the same time, the land, according to the books of the United States Land Office at Camden, Ark., was vacant, and subject to homestead entry under the laws of the United States.

"On the 22nd of December, 1879, Eakin entered it under an "Act of Congress entitled 'An act to secure homesteads to "actual settlers on the public domain,' approved May 20, "1862, at the land office at Camden, and paid the receiver "$10.05 and took his receipt. Eakin has remained in posses-"sion of the land at times since the 1st day of March, 1879."

The note for the purchase money was assigned to the appellant, Robert R. Shannan, some time after it was due.

The note not having been paid, Shannan brought suit "on "the note and bond, to foreclose a vendor's lien claimed by "him on the lands sold to Eakin.

"The Court held that Shannan had no lien on the land; that "the note was without consideration, and dismissed the com-"plaint and Shannan appealed."

The Supreme Court in affirming the judgment held, that the note and lien were not enforceable, for the reasons:

First: There was no evidence that the land was swamp land on the 28th day of September, 1850, or was confirmed to the State.

Second. The State Constitution of 1868 "Prohibited the "encumbering of homesteads of residents of this State who "are married men or heads of families, in any manner while "owned by them, except for taxes, laborers and mechanics' "liens and securities for the purchase money," and

Third: The Act of Congress "to secure homesteads to act-"ual settlers" under which Eakin entered the land at the land office at Camden "expressly provides that the land acquired "under it, (under the Act of Congress), shall not 'in any event "become liable to the satisfaction of any debt contracted prior "to the issuing of the patent therefor'." (Rev. St. U. S. Secs. 2290, 2291, 2296, 2297.)

To Sage vs. Hampe, 235 U. S., 99, we have already heretofore directed the attention of the court in our contention that the writ of error should be dismissed for want of jurisdiction.

To the other authorities cited on page 8 of the brief for plaintiffs in error we have been unable to gain access, and must content ourselves by challenging their pertinency to the issues herein.

Believing that the question of failure of consideration is in no wise involved in this case we feel that nothing will be accomplished by a discussion of that phase of the case or the authorities cited by plaintiffs in error further than has already been done.

Resume and Conclusion.

That no federal question is involved, such as would confer on this Honorable Supreme Court jurisdiction to review the judgment of the State Supreme Court we cite.

Conde vs. York, 168 U. S., 642;
Giles v. Little, 134 U. S., 645;
Miller v. Lancaster Bank, 106 U. S., 542;
Mong v. Converse, 91 U. S., 105;
Hale v. Gaines, 22 Howard, 144;
Will v. Morris, 20 Howard, 3;
Northern Pacific v. Patterson, 154 U. S., 130;
Kennard v. Nebraska, 186 U. S., 304;
Telluride Power Transmission Co. v. Rio Grande Western Ry. Co., 175 U. S., 639;
Brooks v. Missouri, 124 U. S., 394;
Millignor v. Hartupee, 6 Wallace, 255;
Mobile Trans. Co. v. Mobile, 187 U. S., 479;
U. S. etc. Co. v. Richmond, 15 Wallace, 3;

That Reinhart, the vender of plaintiffs in error and payee in the three notes sued upon, was in possession of the land under color of title acquired in good faith and not in contravention of the Act of Feb. 25th, 1885, we cite.

Cameron vs. U. S., 148 U. S., 301;
Mattison v. Howard, 8 How., 50, 15th L. Ed, 280;
Coryell v. Cain, 16 Cal., 567;
Tidwell v. Chiricahua Cattle Co., 53 Pac., 392;
Christy v. Scott, 14 How., 292, 14th L. Ed, 426;
Atherton v. Fowler, 96 U. S., 513, 14th L. Ed, 732;
Crocker v. Robertson, 8 Iowa, 405.

The case of Crocker v. Robertson, and the case at bar are as like as two black-eyed peas are one to the other, and in the case cited the Supreme Court of Iowa refused to enjoin foreclosure of a mortgage which defendant sought to enjoin upon the identical ground upon which defendants here seek to escape foreclosure, *viz.*, that the plaintiff in the foreclosure

proceeding, "had no title to the land, that the covenants of "his deed are broken, and therefore he had no right to pro- "ceed with the foreclosure of the mortgage." The court said:

"First. That there is no such showing in the bill, of "either fraud or mistake, and no such showing as that the "plaintiffs would sustain an irreparable injury by being "turned over to their legal remedy, upon the covenants claim- "ed to be broken, as to justify a court of equity by injunc- "tion.

"Second. It is fully shown that Crocker was well aware "of the actual condition of the title, of which he now com- "plains, at the time he took the deed, and that there has "been no change of parties or facts since that time.

"Third. Granting the alleged defect to exist, plaintiffs "are in no condition to complain. At most, defendant is "only proceeding, according to plaintiff's own showing, to "sell property to which they have no title. Under such cir- "cumstances, it does not readily appear how they could be "prejudiced, and, least of all, sustain such irreparable in- "jury as would entitle them to an injunction."

Searle v. School District, 133 U. S., 533, 33 L. Ed 740, and cases cited.

We respectfully insist that the writ of error should be dismissed for want of jurisdiction and so move this Honorable Court, but in the event jurisdiction shall be retained then that the judgment of affirmance by the State Supreme Court should be re-affirmed by this Honorable Court.

Respectfully submitted by

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NO. 214.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

D. B. SMITH AND GERTRUDE W. SMITH,

Plaintiffs in Error,

vs.

THIRD NATIONAL EXCHANGE BANK OF SANDUSKY, OHIO, AND F. P. ZOLLINGER,

Defendants in Error.

REPLY ARGUMENT BY PLAINTIFFS IN ERROR TO BRIEF OF DEFENDANTS IN ERROR.

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FIRST. AS TO JURISDICTION.

The contention of defendants in error that the right or immunity from suit necessary to support the jurisdiction of this court in granting a writ of error to the Supreme Court of New Mexico must be some affirmative right or immunity which the statute expressly purports to confer on one occupying the position of the plaintiff in error, and that the right of pleading the illegality, under a Federal statute, of a contract which is rendered illegal by the statute, when neither the contract nor the statute expressly confer on either party the right to make such a defense, but when the right is claimed as a consequence resulting from the illegality, under the Federal statute, of the contract sued on, will not make a case of which this court has jurisdiction, is not maintainable in the light of the decision by this court in the case of Nutt vs. Knut, 200 U. S., 12, and Sage vs. Hampe, 235 U. S., 99. Nor can it make any substantial difference whether the right of defense or to immunity from suit, based on the illegality of the contract sued on by the plaintiff, rests on a statute expressly declaring such

contracts void, or upon a statute, which, as in the instant case, prohibits and makes a crime the entering into such contract, if at last the contract sued on is void because it is illegal under the inhibitions of the statute and is contrary to the public policy reflected by the statute. In neither event does the statute purport to confer a right upon the defendant but in each he was as much prohibited from entering into the contract as was the plaintiff who sues upon it. But in each case the defendant has the right, in the public interest, by virtue of the policy of the statute, and the implied incorporation into it, of the usual results of violating its provisions—the right to make the defense of illegality. The fact that the right or defense exists, not out of consideration for his conduct, but is conferred on him by the implications of the statute arising from its policy, when construed with reference to existing laws as to the invalidity of illegal contracts, does not affect the fact that he is endowed with the right to make the defense of illegality, and that it is a defense and immunity which he claims under a United States statute.

Defendants in error may find some support from cases decided by this court prior to the last two cases above decided, and indeed it was recognized in Nutt vs. Knut there might be such cases, but this court decided to adhere to a different line of decisions and, thereby, to overrule whatever expressions the court had made to the contrary in prior opinions.

Nor can it make any substantial difference whether the defense of illegality arose in a suit for damages for breach of an illegal contract, or for compensation by one party to it, as was the case in Nutt vs. Knut and Sage vs. Hampe, supra, or upon a suit in equity, as in the instant case, to enforce an executory contract—a mortgage on public lands, unless indeed, the latter class of cases presents even a stronger case for denial of judicial relief.

In the case of Nutt vs. Knut, 200 U. S., 12, this court said:

"They insisted that the contract sued on was in violation of that statute; and that they and the estate of Nutt were protected by its provisions against any judgment whatever in favor of the plaintiff. In every substantial sense, therefore, they asserted a right and immunity under the statute of the United States, and such right and immunity was denied to them by the Supreme Court of Mississippi. That court expressly adjudged that the contract was not, on its face, in violation of the statutes of the United States, and could legally be the basis of a valid claim against the Nutt estate. The case, so far as our jurisdiction is concerned, is therefore within

No. 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), which authorizes this court to re-examine the final judgment of the highest court of a state, 'where any title, right, privilege, or immunity' is claimed under a statute of the United States, and the decision is against such title, right, privilege, or immunity specially set up or claimed. A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of No. 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved."

In Sage vs. Hampe, 235 U. S., 99, this court cited with approval Nutt vs. Knut, and said:

"A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for non-performance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. Kalem Co. vs. Harper Bros., 222 U. S., 55, 63, 56, L. Ed. 92, 96, 32 Sup. Ct. Rep. 20; Ann. Cas. 1913A, 1285. And more broadly, it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit. * * * * *

"The only doubt open in the present position of the case is whether the ground upon which we hold the contract unenforceable is not a matter of common law, which we may think that the Kansas courts ought to apply, but which is not open to review here. The case at first sight seems like those in which a state decides to enforce or not to enforce a domestic contract notwithstanding or because of its tendency to cause a breach of the law of some other state. Graves vs. Johnson, 179 Mass. 53, 88 Am. St. Rep. 355, 60 N. E. 383, 156 Mass. 211, 15 L. R. A. 834, 32 Am. St. Rep. 446, 30 N. E. 818. But the policy involved here is the policy of the United States. It is not a matter that the states can regard or disregard at their will. There can be no question that the United States can make its prohibitions binding upon others than Indians to the extent necessary effectively to carry its policy out, and therefore, as on the grounds that we have indicated, the contract contravenes the policy of the law, there is no reason why the law should not be read, if necessary, as broad enough to embrace it in terms."

SECOND. AS TO "GOOD FAITH" POSSESSION.

MISSTATEMENT OF THE RECORD. The defendants in error on page 19 of their brief quote from the findings made in the Judgment as it was first entered as to good faith possession, and they would impress this court with the view that this finding remains unchanged in the final judgment, but was stricken out of the findings of fact, and on page 21 of their brief they say:

"Counsel endeavors to construe the action of the trial court in striking out the words 'in good faith' into a refusal of the court to find that Reinhart held under color of title acquired 'in good faith.' See 1st paragraph, p. 13 of brief for plaintiffs in error.

"This Honorable Supreme Court of the United States can be little concerned as regards the reason or reasons why these words were stricken from the findings of fact, especially in view of the final judgment rendered and wherein the recital is made and the trial court adjudged 'that the said W. H. Reinhart and his predecessors in title and claim held, occupied, used, cultivated, improved, and possessed the said lands for more than fifteen years, in good faith,' etc. See 'Final Judgment' Tr. of R. p. 61, 3rd paragraph 13th to 16th lines."

Now this is a palpable misstatement of the record. The quoted finding of a holding in "good faith" is to be found in the judgment as rendered and entered on November 30, 1914, in the third paragraph of the judgment on page 61 of the printed record, and it was not contained in the separate special findings of fact made by the trial court on the same day, but was erroneously and contrary to the understanding of the court and the attorney for all parties inserted in the judgment entry. Afterward on the 24th day of June, 1914, under a stipulation by the attorneys of all the parties the judgment was corrected by striking out the words "in good faith" and re-entered *nunc pro tunc* as of November 30, 1914. The stipulation of the respective attorneys and the order of the Court read as follows:

"And thereafter, on, to-wit, the 24th day of June, A. D., 1914, there was filed with the clerk of said court, in said cause, a stipulation for corrected decree, which said stipulation is in words and figures following, to-wit:

"STIPULATION FOR CORRECTED DECREE.

"This stipulation, made and entered into this 22nd day of June, A. D., 1914, by and between plaintiffs and defendants, through their respective attorneys, witnesseth:

"That, whereas, in the rendition of final judgment here-

on, to-wit, April 30, 1914, there were certain errors of omission and commission;

And, whereas, it is the desire of the parties hereto
"120 to correct said judgment in accordance with the facts, the findings of fact and conclusions of law as found and made by the court.

"It is hereby agreed that an order may be entered by the presiding judge of this court correcting said judgment as follows, to-wit:

"(a) By inserting in the second line, after the words 'coming regularly on for trial,' the words 'in open court';

"(b) By striking from the third finding of fact, fourth line from the bottom of page two, after the words 'for more than fifteen years,' the words 'in good faith.'

"And it is further agreed that the correction of said judgment shall be made in the manner aforesaid, without prejudice to any action taken, or proceeding had, or order made herein co-incidental with the entry of said judgment or subsequent thereto; that the signing of this stipulation shall not be considered or construed as a consent by defendants, or either of them, to the rendition of said judgment or as a waiver of any of their rights in the premises; that the said correction judgment shall be entered *nunc pro tunc* as of April 30, 1914, and thereafter said judgment as thus corrected shall stand as though thus originally entered;

"And it is further agreed that an order entered herein on said 30th day of April, A. D., 1914, making certain findings of fact requested by defendants, noting defendants' exceptions, granting an appeal from said judgment and fixing the amount of supersedeas bond to be given by defendants
"121 herein, shall be considered and shall be and become a part of said judgment as thus corrected.

"Las Cruces, N. M., June 22, 1914.

Seymour Thurmond,
W. H. Winter,
El Paso, Texas;
R. L. Young,
J. H. Paxton,
Las Cruces, N. M.,
Attorneys for Plaintiff.

F. G. Morris,
S. B. Gillett,
El Paso, Texas:
Holt & Sutherland,
Las Cruces, N. M.,
Attorneys for Defendants."

And thereafter, on, to-wit, the said 24th day of June, A. D., 1914, there was filed with the clerk of said court, and entered of record in said cause, an order correcting decree, which said order is in words and figures following, to-wit:

"ORDER CORRECTING DECREE.

"This cause coming on this day further to be heard upon written and signed stipulation entered into between counsel for the respective parties plaintiff and defendant for the entry of an order correcting, as hereinafter specified, the final judgment and decree heretofore entered herein, on, to-wit, April 30th, 1914, and the court having considered said stipulation, and being sufficiently advised in the premises;

"It is therefore considered, ordered, and adjudged and
"122 decreed by the court here that said final judgment and decree be, and the same hereby is, corrected as follows:

"(a) By inserting in the second line thereof, after the words 'coming regularly on for trial,' the words 'in open court';

"(b) By striking from the third finding of fact fourth line from the bottom of page two, after the words 'for more than fifteen years,' the words 'in good faith.'

"And it is further considered, ordered, adjudged and decreed that the aforesaid corrections of said judgment shall be without prejudice to any action taken, proceeding had, or order made herein co-incidental with the entry of said final judgment and decree, or subsequent thereto; that the said correction judgment shall be entered *nunc pro tunc* as of April 30th, 1914, and thereafter said judgment as thus corrected shall stand as though thus originally entered.

"And it is further considered, ordered, adjudged and decreed that an order entered herein on said 30th day of April, 1914, making certain findings of fact requested by defendants, noting defendant's exceptions, granting an appeal from said judgment and fixing the amount of supersedeas bond to be given by defendants herein, shall be considered and shall be and become a part of said judgment as thus corrected.

"Dated at Las Cruces, N. M., this 23rd day of June, 1914.

Edward L. Medler,
District Judge."

At the date of this correction the appeal from the judgment of the trial court had not been perfected. Hence the statement of defendants in error that the final judgment contained the finding of "good faith" possession by Reinhart and that these words were simply stricken out of the findings

of fact made by the trial judge is erroneous. The findings of fact never contained such a finding, and the court, by agreement of the parties as to the mistake under which the words "good faith" got into the record, struck out the finding in the only place where it had appeared in the record at all.

MATTERS REFERRED TO BY DEFENDANTS IN ERROR WHICH THE RECORD DOES NOT SHOW.

The defendants in error quote from the opinion of the Supreme Court of New Mexico a statement as to a pending private bill in Congress looking to the validating of the title of claimants to the unconfirmed part of the Refugio Colony Grant, and cite the Act as passed by Congress. (Page 20 of their brief.)

With reference to this we have to say that the act in question is a private law, and it was neither pleaded or proved in the trial court or referred to by the trial judge in his findings of fact or in the decree rendered. This court judicially knows, when sitting in a case from New Mexico, that the common law is in force in that state, except to the extent that it is modified by statute. The only statute of New Mexico applicable to the subject of judicial notice of laws is one requiring the courts to take judicial notice of a private statute when such a statute is pleaded. Article 4151 of Revised Statutes of New Mexico contains Sub. 85 of the Civil Code as it was in force when this suit was brought and tried, reading as follows:

"In pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the Court shall thereupon take judicial notice thereof."

It follows that all that is said about this alleged validating Act of Congress is unsupported by the record and is not judicially known to the court, and may not, therefore, be considered.

But if this bill which was pending when the illegal sale in question was made, be referred to, and if it appeared that the parties litigant had knowledge of it, this would only emphasize the fact that the then status was that of resting on the invalid claim, and would negative good faith. If the transaction was illegal when it took place the contracts of sale and mortgage to secure purchase money were void for illegality, and were not validated by the act in question. The act in question did not validate any claim but gave a mere preferential right of purchase under certain proofs being made.

THE COURT DETERMINES THE FACTS FOR ITSELF WHEN THE APPLICABILITY OF A FEDERAL STATUTE IS INVOLVED.

This court will not be bound by a holding of the Supreme Court of New Mexico that a possession of public land of the United States was held in good faith, when the facts found by the trial court and the other findings of fact made by the Supreme Court of New Mexico necessarily negative any good faith holding at the time the alleged illegal possession, sale, and mortgage of the public land in question is shown to have occurred. Both parties were content with the special findings of fact made by the trial court. The Supreme Court seems to be also content with those findings, and itself makes findings of fact which preclude any holding of good faith possession by Reinhart or his vendors, or those under whom they held a chain of transfers after the decision of the Court of Private Land Claims against their claim. The good faith holding of all the parties exercising acts of ownership of said land prior to the decision of the Court of Private Land Claims is not questioned by plaintiffs in error. But plaintiffs in error contend that when this tribunal was created by Act of Congress for the benefit of good faith claimants under Mexican Grants, and they were thereby afforded a forum in which they might have decided the question of their ownership of the land they claimed, both with respect to the validity of the grant and as to its boundaries, and the corporation created by them to sue and be sued in their behalf, with respect to said grant, voluntarily entered suit to have the matters in dispute settled as between them and the Government of the United States and were cast in the trial, and declined to appeal from the decision, they could not claim that the suit was abortive and did not extinguish the good faith of their claims, and that after the passage of the Act of 1885 prohibiting exclusive occupancy, claim and sale of public land they could still hold as against the United States and protect themselves from prosecution for illegal possession, and deal with the land as their own, on the ground that their good faith holding was never extinguished by the judgment of the Court of Private Land Claims. Such a position would violate the policy of the Act creating the Court of Private Land Claims and render the proceedings in said court a farce.

But the Supreme Court of New Mexico concedes in its findings that the judgment in question was binding on the claimants who sued and those deriving holdings under them, but seem to think that as between them and parties to whom

they may have sold and delivered possession, some sort of good faith claim was permissible and existed. But the very question at issue is the illegality of the transaction as between the United States and Reinhart who made the sale and delivery to Smith. If it was an illegal act of which the government might complain, this rendered the contract illegal and unenforceable even as to a stranger. The decision by this court in Sage vs. Hampe, 235 U. S., 99, meets this point. In that case the Supreme Court of Kansas had held that a stranger to the allotment to Indians was bound by his contract of purchase. But this court reversed the judgment and held that anyone contributing by his contract to a violation of the policy of an Act of Congress inhibiting certain sales might defend on the grounds of the illegality of contract.

As is shown in our main brief, the Supreme Court of New Mexico finds, as does the trial court, that the proceedings were had before the Court of Private Land Claims by the alleged good faith claimants to have the title and boundary questions settled; that judgment went against them as to boundaries so that they were adjudged to be without title under the Colony Grant, and none other existed from the sovereignty of the soil; that Reinhart and Smith, the one seeking to transmit exclusive possession and claim of public land, and the other accepting the same, knew of said decision against those under whom Reinhart held, and that Reinhart knew he had no title, but by a strange contradiction in terms, it seems to be held that he was a holder in good faith of public lands. This holding, it is respectfully insisted impeaches the very definition and meaning of "good faith" as applied to one's holding of land. Such a holding must necessarily include an honest belief by the holder himself that he has title however much he may know that others dispute it.

There is no contention that the Bank, defendant in error, is not affected by all that Reinhart, the payee of the notes sued on, is affected by. The findings of fact by the trial and Supreme Court so find.

THE DEFENSE OF NO VALUABLE CONSIDERATION FOR THE NOTES OR MORTGAGE.

The defendant in error suggests that this defense does not depend upon the Federal statute and presents no Federal question. This would be true if the plaintiff in error were making the defense accompanied with a tender of possession of the land. But this defense, while it need not rest on any denial of good faith holding of Reinhart when the notes and

mortgage were given, but may rest on the fact that whatever faith Reinhart had he could not in fact transmit any title, and that, therefore, plaintiff in error did not receive anything of value for the notes or mortgage. This defense would be good without reference to any Federal statute if it did not require a tender back of the possession received at the sale and mortgaging. But to make this defense complete without a tender of the possession received in the transaction, we must invoke the Federal statute and claim the right under that statute to make this defense without restoring possession, because whatever the good faith at the time of the transaction in 1909, there can be no pretense of good faith at the time of the trial in any belief that plaintiff in error or Reinhart or the Bank defendant in error had any good faith in their alleged claim. Hence to restore the possession of Reinhart or the Bank for his rights would require a new violation of the Act of 1885, and may therefore be dispensed with under said statute, and by aid of this act of Congress the defense of want of consideration for the notes and mortgage may be made good without restoring the possession, whereas, without this excuse for not restoring the possession, in other words, under general law without the Act of Congress entering into the defense, it is not good, but aided by this act, it is a good defense without regard to the original illegality of the sale and mortgage.

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